

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

SYNGENTA CROP PROTECTION, LLC.,)
)
 Plaintiff,) Civil Action
) No. 15CV274
)
vs.)
)
WILLOWOOD, LLC, WILLOWOOD) September 8, 2017
USA, LLC., WILLOWOOD)
AZOXYSTROBIN, LLC, and)
WILLOWOOD LIMITED,)
)
Defendants.)
)

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE CATHERINE C. EAGLES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: HARI SANTHANAM, ESQUIRE
RUSSELL E. LEVINE, ESQUIRE
KOURTNEY BALTZER, ESQUIRE
Kirkland & Ellis, LLP

RICHARD A. COUGHLIN, ESQUIRE
Smith Moore, LLP

For the Defendants: STEVEN E. TILLER, ESQUIRE
BARRY S. NEUMAN, ESQUIRE
PETER J. DAVIS, ESQUIRE
Whitefield Taylor & Preston

ALAN W. DUNCAN, ESQUIRE
Mullins Duncan Harrell & Russell

I N D E X	
1	
2	WITNESSES FOR THE PLAINTIFF: PAGE
3	JOSEPH MEDDIONE (BY DEPOSITION) 18
4	BRAD REICHMAN (BY DEPOSITION) 21
5	DR. REX WICHERT (Continued)
6	Cross-Examination By Mr. Tiller 6
7	Redirect Examination By Mr. Santhanam 12
8	BENJAMIN WILNER
9	Direct Examination By Mr. Santhanam 37
10	Cross-Examination By Mr. Neuman 93
11	Redirect Examination By Mr. Santhanam 154
12	Recross-Examination By Mr. Neuman 168
13	Redirect Examination By Mr. Santhanam 171
14	Plaintiff rests 172
15	WITNESSES FOR THE DEFENDANT:
16	JANELLE KAY
17	Direct Examination By Mr. Neuman 176
18	Cross-Examination By Mr. Coughlin 193
19	EXHIBITS: RCVD
20	PX-40 Email from J. Middione to B. Heinze 19
21	PX-42 Email from A. Tillman to C. Hayden 193
22	PX-44 Email from A. Tillman to B. Heinze 193
23	DX-71 Outline of Syngenta's National Retail Program 6
24	DX-92 July 2015 PPS -- Product Management Meeting 4
25	DX-120 May 2015 email string between Willowood and Reichman 21
	DX-123 Willowood sales information to Reichman 21
	DX-128 2016 Azoxystrobin Pricing Presentation 151
	PX-171 Email from B. Heinze to A. King 21
	PX-181 Email from J. Middione B. Heinze 19
	PX-187 Email from B. Heinze J. Middione 19

1 P R O C E E D I N G S

2 (Proceedings commenced at 9:15 a.m.)

3 THE COURT: Good morning. Anything we need to take
4 up before the jury comes in?

5 MR. TILLER: Two very quick matters, Your Honor.

6 First of all, Defendant's Exhibit 92, which had been proffered,
7 I believe, two days ago. The parties have agreed to remove
8 Bates page SYN-162713.

9 MR. SANTHANAM: Yes, Your Honor.

10 THE COURT: All right. With that deletion,
11 Defendant's 92 will be admitted.

12 MR. TILLER: Yes.

13 THE COURT: And you'll substitute a copy?

14 MR. TILLER: We will do that. Absolutely.

15 THE COURT: All right.

16 MR. TILLER: And, Your Honor, just sort of a
17 scheduling favor to ask of the Court. We presume that the case
18 will be handed to us today. At that time we'll want to make
19 some motions, but we have multiple witnesses that are hoping to
20 get on flights tonight or tomorrow. One in particular has to
21 fly to China. So I was hoping that we could maybe put those
22 arguments on the motions until the end of the day.23 THE COURT: That's all right with me. Is that okay
24 with --

25 MR. LEVINE: Yes. We have motions, too, and we were

1 just going to orally state what motion we are filing and then
2 file the actual papers at the end of the day today on ECF. I
3 didn't even think you would want to hear argument today so we
4 can just keep moving everything forward.

5 THE COURT: That makes sense. I'll be glad to hear
6 whatever you all want to say today after the jury leaves.

7 MR. TILLER: It will save us a couple minutes.

8 THE COURT: That sounds like a good idea.

9 All right. You can bring the jury in.

10 I might excuse the jury briefly when the Plaintiff
11 rests just to let everybody say "We move for" whatever and then
12 we'll defer the arguments and bring them right back in if it
13 doesn't happen at a normal break time.

14 (Jury panel is present.)

15 THE COURT: Good morning. It looks like this
16 hurricane, if it gets here, will not be until Tuesday, so I
17 think we're safe to just proceed or assume we'll proceed as
18 normal on Monday. If anything happens with the weather that
19 makes that not the case, you'll get an e-mail or a phone call
20 from the Court with some -- you know, with a revision to the
21 schedule. I think Ms. Sanders did give you her number
22 yesterday, so if you, you know, get flooded out or something
23 horrible, which, of course, we hope doesn't happen, but any
24 sort of emergency, you can let her know. But it looks -- of
25 course, I know we all hope we just avoid it completely, that it

1 spins out over the ocean and does no further harm; but if it
2 does come this way, it looks like it will be Tuesday, so we'll
3 deal with that if and when it happens.

4 All right. I think we're ready to proceed and we
5 were in cross-examination of Dr. Wichert, correct?

6 MR. TILLER: Thank you, Your Honor.

7 THE COURT: Go ahead, Mr. Tiller.

8 **REX WICHERT**

9 **CONTINUED CROSS-EXAMINATION**

10 BY MR. TILLER:

11 Q. Good morning, Dr. Wichert.

12 A. Good morning.

13 MR. TILLER: Your Honor, I would like to show the
14 witness Defendant's 71.

15 THE COURT: Go ahead.

16 MR. TILLER: I would like to move for its admission.

17 MR. SANTHANAM: No objection, Your Honor.

18 THE COURT: It will be admitted.

19 BY MR. TILLER:

20 Q. Dr. Wichert, what is Defendant's 71?

21 A. This is Syngenta's national retail program. It's a
22 document that we provide to our retail customers, outlines our
23 programs.

24 Q. What kind of programs?

25 A. Discounts or payments we make to them for selling,

1 managing our products to their customers.

2 Q. I would like you to take a look at the fourth page, which
3 is SYN-035479. Do you have that page, sir?

4 A. I do.

5 Q. That chart at the top, what is that?

6 A. It's -- we call it our Key Active Ingredient Support
7 Program.

8 Q. And you see in the second line where it says: Reward
9 retailer's for their support of Syngenta products where a
10 generic alternative exists?

11 A. Correct.

12 Q. In the body of the chart, in the third column, it is --
13 the third column is entitled "Retailer Support Threshold."
14 What does that mean?

15 A. That's the level of Syngenta AI or molecular shares, we
16 call it, that they have to maintain in order to earn the
17 incentive on the right side. It's part of the increased
18 discounts we pay to the channel when we come under competition.

19 Q. So just to make sure this is what I understand -- tell me
20 if I'm wrong -- if the retailer -- for example, with
21 mesotrione, if the retailer sells 99 percent of its mesotrione
22 for the year, it is entitled to a 5 percent rebate at the end
23 of the year?

24 A. Yes. So for azoxystrobin if they sell -- if the --

25 Q. Can you just focus on mesotrione?

1 A. If the mesotrione that the retailer sells, 99 percent of
2 it is Syngenta molecule or AI, then, yes, they would earn that
3 incentive.

4 Q. Okay. And it would -- it gets that 5 percent
5 discount -- what is that discount of? What's the denominator?

6 A. They get paid 5 percent on the list price of the Syngenta
7 products.

8 Q. Of the mesotrione products?

9 A. Yes.

10 Q. So similarly for azoxystrobin, is it true that if the
11 retailer sells 94 percent of its azoxystrobin AI during the
12 year, its Syngenta AI, that it would then earn a 10 percent
13 incentive at the end of the year?

14 A. That would be correct for the 2016 cropping season.

15 That's the year that this document is for.

16 Q. Why is there a difference in the retailer support
17 threshold between mesotrione and azoxystrobin?

18 A. We manage that with the life cycle of the product and just
19 the competition in the marketplace. You can see that the older
20 products were -- there is more generics in the market, like
21 Gramoxone or Paraquat at the bottom, the threshold continues to
22 decline.

23 Q. With age?

24 A. Correct.

25 Q. Why is there a difference in the incentive?

1 A. The incentives differ just due to the pressure and the
2 profit that we try to help our retailers make on those products
3 and the amount of effort -- it has do with the amount of effort
4 that is required to sell those products.

5 Q. Do -- I'm done with that document, Doctor.

6 Do all market conditions affect the sales of
7 azoxystrobin and mesotrione in the same way?

8 A. I don't know if I would say all, but I would say the
9 majority or most.

10 Q. Which ones don't?

11 A. I actually can't think of any that would have a difference
12 right now.

13 Q. What about disease proliferation? If there is a large
14 amount of fungal disease in the South in a particular growing
15 season, would that condition affect sales of azoxystrobin in
16 the same way it affects sales of mesotrione?

17 A. No. Disease proliferation would have an impact on
18 azoxystrobin, whereas weed proliferation would have an impact
19 on mesotrione.

20 Q. Would disease proliferation have the same effect -- strike
21 that. Would disease proliferation have the same extent of the
22 effect on azoxystrobin as weed proliferation has on mesotrione?

23 A. I believe they are similar. Resistant weeds, for example,
24 have driven usage in herbicides and disease proliferation
25 drives the use in fungicides. We've also worked hard over the

1 years, starting when we launched azoxystrobin, to make it a
2 planned application in crops, and we've marketed and invested a
3 lot in doing that, and we've been pretty successful. Growers
4 now plan to use it; so as they plan to use herbicides, it's
5 a -- that was our intent. It's similar.

6 Q. Still a large percentage of row crop acres in the United
7 States are not treated with any fungicides, correct?

8 A. Correct.

9 Q. You spoke yesterday about the data. I think you called it
10 data exclusivity for mesotrione. Do you recall that?

11 A. Yes.

12 Q. And you said that -- and correct me if I'm wrong. I just
13 want to make sure that you and I are on the same page. I
14 believe you said for ten years generics may not rely on
15 Syngenta's data to apply for a generic application, is that
16 correct?

17 A. Yes, that's correct.

18 Q. After that ten-year period, isn't it true that any generic
19 can rely on that data, but that the generic applicant must pay
20 compensation to the data owner, so here Syngenta, for the
21 expenses related to generation of that data?

22 A. Yes. When they cite our data, they have to send Syngenta
23 a letter that basically says: We offer to pay you for use of
24 this data.

25 Q. And Willowood did that, didn't it?

1 MR. SANTHANAM: Objection, Your Honor.

2 THE COURT: Sustained. So, ladies and gentlemen,
3 this data exclusivity payment is not at issue in the case in
4 terms of Syngenta and Willowood. It's out there, but it pays
5 for a different thing than intellectual property rights, so you
6 don't need to consider any specifics about that here because
7 the case is not about data compensation.

8 MR. SANTHANAM: Move to strike, Your Honor.

9 THE COURT: Well, he didn't answer the question, so
10 there is nothing to strike.

11 You can ask your next question.

12 BY MR. TILLER:

13 Q. The data owner, so in this case Syngenta, or any data
14 owner -- let's just talk data owners in general -- can initiate
15 a proceeding to enforce that right for payment?

16 MR. SANTHANAM: I'm going to object to relevance,
17 Your Honor. I do request a sidebar.

18 THE COURT: Okay. Well, he can answer that question
19 and then we'll move on. Overruled.

20 A. Yes. So the offer to pay -- the data owner has to --
21 really has the burden to go collect. The only way to force
22 payment is to undertake a significant cost and go to
23 arbitration.

24 Q. When the azoxystrobin compound patents expired in February
25 of 2014, did 88 percent of Syngenta's sales of azoxystrobin

1 come from the sale of mixtures with other active ingredients
2 that were still under patent protection?

3 A. For azoxystrobin?

4 Q. For azoxystrobin, yes, sir.

5 A. I don't know the -- I don't know the exact percentage
6 without looking at the data; but if I just think through the
7 market dynamics, the biggest product would have been our Quilt
8 brands and the Tilt patents which it's mixed with would have
9 expired long before. The only mixture I can think of that had
10 a patent on it would have been the top brands, so it would have
11 been -- I would have to say it was way less than 88 percent.

12 Q. That would have been the Solatenol mixtures?

13 A. No. The Solatenol mixtures weren't introduced until last
14 year.

15 MR. TILLER: Thank you. Nothing further, Your Honor.

16 THE COURT: Redirect?

17 MR. SANTHANAM: Briefly, Your Honor.

18 REDIRECT EXAMINATION

19 BY MR. SANTHANAM:

20 Q. Dr. Wichert, you were asked some questions just now about
21 patent protection with respect to mixtures. Now, if we could
22 turn back to Defendant's Trial Exhibit 92 and specifically I
23 would like to go to page 8, which is SYN-162696.

24 MR. SANTHANAM: If we could put that up on the
25 screen, David.

1 Can we switch over?

2 If we can zoom in on the box in the lower right.

3 BY MR. SANTHANAM:

4 Q. Now, Dr. Wichert, you were asked questions about patent
5 protection with respect to mesotrione products yesterday. Do
6 you recall that?

7 A. I believe so, yes.

8 Q. You know, it was indicated to you or you were questioned
9 about patents that Syngenta may have with respect to mixture
10 products, is that right?

11 A. Correct.

12 Q. Now, you mentioned yesterday -- and I'm going to put up
13 Plaintiff's Trial Exhibit -- Demonstrative Exhibit 24. Now,
14 Dr. Wichert, were there any patents that Syngenta had after the
15 compound patents expired relating to azoxystrobin?

16 A. Yes. We had the '138 and the '761 patents.

17 Q. With respect to mesotrione, if you could look at
18 Defendant's Trial Exhibit 92, did the fact that Syngenta had
19 patents relating to mixture products prevent generics from
20 entering at some point?

21 A. No, it didn't.

22 Q. What -- generics did enter, is that right?

23 A. They entered much the same way we started with solo
24 products, what we call our established brands.

25 Q. Can you explain what a solo product is?

1 A. A solo product would be like Quadris. It's only
2 azoxystrobin. Where when we talk about enhanced brands, it
3 would be like a mixture of azoxystrobin and propiconazole.
4 What you see is basically -- you know, when you create a market
5 with those mixtures, it's a bit different; but when somebody
6 follows in on those markets, it's fairly easy for them to
7 recommend or bundle a propiconazole-containing product -- solo
8 product with their azoxy solo product and just make the tank
9 mixture in the fields, so it effects --

10 Q. If you could slow down, Dr. Wichert.

11 A. When somebody enters with a solo product like that, it
12 will impact the whole brand ladder. They'll just make the
13 mixtures in the field.

14 Q. We heard the term "straight azoxy" yesterday. Would this
15 be straight mesotrione?

16 A. Yeah, straight solo, so it would be a product with only
17 that active ingredient in the formulation.

18 Q. How is it that the introduction of generic, straight or
19 solo mesotrione products affect mixture products on Syngenta's
20 brand ladder?

21 A. For mesotrione, for example, we have a lot of people using
22 generic mesotrione that then mix it with metolachlor products
23 on the market or acetochlor products -- they're in the same
24 family -- and they in essence, create a mix in their spray tank
25 that's equivalent to the established brands we sell, the Lumax

1 and Lexar, in the marketplace.

2 Q. Dr. Wichert, did the -- I guess the introduction of a solo
3 meso product, when did that happen?

4 A. The first instance we had, we had a little bit of activity
5 in 2016. We had fair amount of activity in 2017.

6 Q. On Plaintiff's Trial Exhibit 92, there are references to
7 some patents relating to mixtures. Did those patents prevent
8 generics from coming in with solo products with meso?

9 A. No, they did not.

10 Q. Yesterday you discussed similarities between the life
11 cycle of meso products and azoxy products up until 2014. Was
12 there a divergence in 2014 in any way?

13 A. The biggest divergence in how they paralleled each other
14 was we had immediate pressure in 2014 on azoxystrobin and it
15 was really 2017 before we had significant pressure with
16 mesotrione from a generic standpoint.

17 Q. Can we go to Defendant's Trial Exhibit 71? I believe that
18 was before you, Dr. Wichert.

19 MR. SANTHANAM: David, if you could go to the page
20 ending in 79. If you can zoom in the top two.

21 BY MR. SANTHANAM:

22 Q. You recall being questioned about the incentives and
23 difference in incentives between mesotrione and azoxystrobin.
24 Do you recall that, Dr. Wichert?

25 A. Correct.

1 Q. I think you mentioned something about the date of this
2 document. When was this document dated?

3 A. This program -- our program year for customers runs from
4 October 1st to basically the end of September the following
5 year, so this program would have started in October of 2015 and
6 ended at the end of September in 2016. It's basically for the
7 2016 growing season, as we call it.

8 Q. Dr. Wichert, it was pointed out to you that for
9 azoxystrobin there was a 10 percent incentive offered to
10 distributors or retailers, whereas for mesotrione there was a
11 5 percent discount. Do you recall that?

12 A. Correct.

13 Q. As of this growing season, was Willowood in the market
14 selling azoxystrobin products?

15 A. Yes, they were.

16 Q. As of this growing season, was Willowood in the market
17 selling mesotrione products?

18 A. I don't recall exactly when they entered, but the only
19 company I recall selling in 2016 was a product called Bellum
20 and I believe it was from Rotam.

21 Q. Dr. Wichert, I think this term "untreated acres" came up
22 that was used during cross-examination. I would like to ask
23 you about a different term, "distributor inventory." Are you
24 familiar with that term?

25 A. Yes.

1 Q. Can you tell us how, if at all, going from 2014 onward,
2 Willowood impacted distributor inventory?

3 A. When a generic enters the marketplace, the first -- the
4 distributor inventory -- we run our plants a lot of times
5 year-round for efficiency, and the market happens extremely
6 fast in most situations. So, for example, corn planting used
7 to take months. Now the country can be planted with corn in
8 just a couple of weeks. So you have to have a lot of products
9 staged in the market ready to go because there's just not
10 enough trucks, tanks, to get it into market as fast as it
11 moves. So the distributors hold significant amount of
12 inventory of products at the field level to help with that
13 market space.

14 When generics enter, there becomes a price risk, and
15 they will start to squeeze that inventory down, which
16 impacts -- right? So you -- as long as the inventory's flat,
17 your sales mirror the market. But when the inventory squeezes,
18 it has sort of a compounding impact on your sales because
19 they're selling inventory, and they are not replacing.

20 Q. That was my going to be my next question, Dr. Wichert.
21 When distributor inventories decrease, what happens to
22 Syngenta's profitability?

23 A. Our sales go down considerably. Then we start reacting,
24 and we put more money in the market.

25 Q. Based on your work in life cycle management as a customer

1 marketing manager and your various roles, did Willowood impact
2 distributor inventory with respect to azoxystrobin?

3 A. Yes.

4 MR. SANTHANAM: No further questions, Your Honor.

5 THE COURT: Anything else on the limited topics
6 covered in redirect?

7 MR. TILLER: Nothing further, Your Honor.

8 THE COURT: No? All right. Thank you. You can step
9 down.

10 (At 9:39 a.m., witness excused.)

11 MR. LEVINE: Your Honor, we're going to play video
12 clips of the deposition of Mr. Jeff Meddione, who is the
13 chief operating officer of Willowood USA.

14 THE COURT: All right. Ladies and gentlemen, you'll
15 remember, I think it was, Wednesday you saw some depositions.
16 This is taken under oath. Everybody is present. Everybody has
17 a chance to ask questions. So you should consider this
18 testimony just as if the witness was present in the courtroom.

19 MR. LEVINE: Okay. Your Honor, we move to admit
20 Plaintiff's Trial Exhibits 40, 181 and 187, which will be shown
21 during this video clip.

22 THE COURT: 40, 181 and --

23 MR. LEVINE: And 187.

24 THE COURT: I'll give the Defendants a moment to
25 look.

1 MR. TILLER: No objection.

2 THE COURT: It will be admitted.

3 MR. LEVINE: David, you can play the video.

4 THE COURT: That was so loud, I couldn't even hear
5 it. Start it over with the volume reduced. That woke us all
6 up, didn't it?

7 (Video deposition of Joseph Meddione played.)

8 MR. LEVINE: Your Honor, for clarity on the record,
9 Plaintiff's Trial Exhibit 40 corresponds to what was in the
10 video testimony as Deposition Exhibit 34, Plaintiff's Trial
11 Exhibit 181 corresponds to what was referred to in the video
12 testimony as Deposition Exhibit 22, and Plaintiff's Trial
13 Exhibit 187 corresponds to Deposition Exhibit 30.

14 THE COURT: Okay. There was some discussion of 33,
15 but that wasn't shown, right?

16 MR. LEVINE: Right.

17 THE COURT: Okay. Go ahead.

18 MR. COUGHLIN: Your Honor, the next witness will be
19 Brad Reichman also by deposition. This is not by video. It
20 will be read.

21 THE COURT: All right.

22 MR. COUGHLIN: If I may approach, Your Honor, we have
23 binders with the exhibits.

24 THE COURT: While he's doing that, ladies and
25 gentlemen, they're going to present this testimony not by

1 video, but with somebody who is not Mr. Reichman sitting up
2 here -- I think it's Mr. Pierce, is that right? Yeah,
3 Mr. Pierce is going to come up here and be Mr. Reichman and
4 read Mr. Reichman's answers, and the lawyers will read the
5 questions that were asked of him at that deposition, so you
6 should consider this just like the video deposition. Even
7 though, you know, you don't have his face before you, you
8 should still consider the testimony the same way as if the
9 witness were here. You can come on up to stand. Of course,
10 Mr. Reichman was under oath.

11 Mr. Coughlin, are you going to read all the
12 questions?

13 MR. COUGHLIN: I am.

14 THE COURT: All right. This includes what each side
15 wants you all to consider from Mr. Reichman's testimony. Go
16 ahead.

17 MR. COUGHLIN: And, your Honor, if I may, for the
18 record, there are three exhibits that we will refer to. It
19 will be Defendant's Exhibit 120, which on the video is referred
20 to as REI-13. The second exhibit is Defendant's --

21 THE COURT: Plaintiff's?

22 MR. COUGHLIN: Defendant's. Defendant's 123, which
23 is referred to as REI-61. And the final exhibit is Plaintiff's
24 Trial Exhibit 171, which on the video is referred to as REI-36.

25 THE COURT: All right.

1 MR. COUGHLIN: I'm sorry, in the transcript, not the
2 video, of course.

3 THE COURT: Transcript, all right. Have those
4 already been admitted?

5 MR. COUGHLIN: No, we are moving for their admission
6 now.

7 MR. NEUMAN: Did you say D-123, Defendant's 123?

8 MR. COUGHLIN: Yes, sir.

9 MR. NEUMAN: And what pages did you say that respond
10 to?

11 MR. COUGHLIN: REI -- it's page 68, but REI-61 on the
12 transcript.

13 MR. NEUMAN: Just REI-61?

14 MR. COUGHLIN: Yes, sir.

15 MR. NEUMAN: No objection.

16 THE COURT: They'll be admitted. You may proceed.

17 MR. DAVIS: Just a moment. So far the -- counsel,
18 it's is my understanding that the designations that you guys
19 have been presenting so far have been Syngenta designations
20 together with Willowood's cross-designations. I heard you say,
21 if I understood you correctly, that -- when you told the jury
22 that this includes all of the information from Mr. Reichman's
23 testimony that both parties want to present, my understanding
24 is that it's Syngenta's designations and Willowood's
25 cross-designations; and to the extent that there's additional

1 testimony that Willowood would like to present in its direct,
2 that will be presented.

3 THE COURT: Oh, all right. I thought it was
4 everything. But -- so I'm mistaken. It's cross-designations
5 as to the --

6 MR. DAVIS: Portions that were designated by
7 Syngenta --

8 THE COURT: -- portions that were there. All right.
9 I'm sorry. Go ahead. I'm sorry about that, ladies and
10 gentlemen. Thank you for correcting me.

11 MR. COUGHLIN: Thank you, Your Honor.

12 (Deposition of Brad Reichman read into the record as
13 follows:)

14 BY MR. COUGHLIN:

15 Q. Could you state your name, please?

16 A. Brad Reichman.

17 Q. And what is your occupation?

18 A. Chemical sales.

19 Q. By whom are you employed?

20 A. Today, Wilbur-Ellis owns Reichman Sales.

21 Q. What is Reichman Sales?

22 A. A chemical company. We sell chemicals.

23 Q. What's is your position within Reichman Sales?

24 A. I'm the general manager now. I used to be the president,
25 but now that Wilbur-Ellis owns us, I'm the general manager.

1 Q. I want to ask you a couple of questions about Reichman
2 Sales & Service. What exactly is the business of Reichman
3 Sales & Service?

4 A. We are a retailer/distributor of ag chemicals all over the
5 country.

6 Q. Could you describe generally the type of customers you
7 sell to? Do you sell to retailers or growers or other
8 distributors?

9 A. We will sell to farmers. We sell to other dealers. So a
10 little bit of the everything.

11 Q. And while you were president of Reichman Sales & Service,
12 what were your responsibilities? What did you do in that
13 position?

14 A. Purchasing and sales. Everything. I mean, it was a small
15 company. Relative to the ag business, it's small. You know,
16 70, \$80 million company, but it's small.

17 Q. Were you directly involved in purchasing and selling
18 agrichemical products?

19 A. Yes.

20 Q. And in that capacity, did you regularly interact with your
21 suppliers and your customers?

22 A. Yes.

23 Q. Okay. And did you regularly negotiate pricing with your
24 suppliers at which your suppliers would sell you agrichemical
25 products?

1 A. Yes.

2 Q. And did you regularly discuss and negotiate with your
3 customers the price at which you would sell agrichemical
4 products?

5 A. Yes.

6 Q. At some point, did Reichman Sales & Service begin to
7 purchase and sell agrichemical products containing
8 azoxystrobin?

9 A. Yes.

10 Q. Do you recall from whom Reichman first began to purchase
11 azoxystrobin products?

12 A. Well, it would have been a Syngenta product because there
13 was no generic for years. So I don't know what year, but, yes,
14 we had sold Syngenta's azoxy product in the past.

15 Q. You purchased azoxy product from Syngenta?

16 A. Not directly. It is all through distributors or other
17 dealers, yes.

18 Q. Who was the first generic from whom Reichman Sales &
19 Service purchased azoxystrobin products?

20 A. Willowood.

21 Q. Willowood. Are you sure about that?

22 A. No. Maybe Cheminova first and then Willowood. Yeah. I
23 think that was the order of things. Cheminova first and then
24 Willowood.

25 Q. Now, I'd like you to turn, please, to REI -- it's the

1 third page of the document, which is Bates stamped page REI 13.

2 Do you have that in front of you?

3 A. Yes.

4 Q. Now, I'd like you to look about halfway down. It says, On
5 May 19, 2015, at 7:23 p.m., Andy King wrote, and it says, Brad,
6 take a look at this.

7 Do you see that?

8 A. Yes.

9 Q. Now, I'd like you to just keep going down through his
10 e-mail to the next page, and he's got some information. This
11 is how it printed out from what you sent. There's various
12 information, and then I would like you to go all the way down
13 to page what's Bates stamped 17, which is still his e-mail.

14 Do you have that in front of you?

15 A. Yes.

16 Q. And right above his identification line, he says,
17 Cheminova only brought enough Azoxy Tech in last December and
18 this February to make two TL's of Equation. They can't have
19 much left.

20 Do you see that?

21 A. Yes.

22 Q. What is an TL?

23 A. Truckload.

24 Q. Do you recall seeing they e-mail from Mr. King?

25 A. Yes.

1 Q. What do you understand he was trying to tell you there?

2 A. He was trying to tell me that there was no product
3 available.

4 Q. From Cheminova?

5 A. From Cheminova.

6 Q. And was he trying to tell you that in order to persuade
7 you to buy it from Willowood?

8 A. I would assume so, yes.

9 Q. All right. And then if you turn back to the third page of
10 this document, REI 13, do you have that in front of you?

11 A. Yes.

12 Q. So right above his e-mail in the middle of that page,
13 there's an e-mail from you to him nine minutes -- 11 minutes
14 later at 11:34 p.m. (sic) on May 19, 2015, and you say, He said
15 today he thought there was 15,000 gallons in stock in Equation
16 SC label, but he was not quite sure because there was two more
17 categories of inventory with Equation and Azaka and did not
18 know if that inventory had been converted to all Equation SC.

19 Do you see that?

20 A. Yes.

21 Q. Who is he in that e-mail that you're sending to Andy King?

22 A. I do not recall.

23 Q. Was it somebody at Cheminova? Would you assume that?

24 A. I would assume it was someone at Cheminova, yes.

25 Q. Okay. So this e-mail from you to Mr. King is dated

1 May 19, 2015. Would it be accurate then to say that by May 19,
2 2015, you were having conversations with someone at Cheminova
3 about possibly supplying azoxystrobin product to Reichman Sales
4 & Service again?

5 A. Yeah. I would assume that, yes.

6 Q. Okay. Could you please look at the first page of this
7 document, Exhibit 5, which is Bates stamped REI 11. It's the
8 beginning of this e-mail chain, towards the top, in any event.

9 Almost near the top, there is an e-mail from you to
10 Andy King dated June 1, 2015, at 10:43 a.m., and you are saying
11 to Mr. King, I don't think I need to wait any longer for my
12 money. You have to remember with FMC I don't have to pay
13 anything up front and I get terms.

14 In fact, by the time FMC shipped you product in July
15 of 2015, you were done with Willowood, were you not?

16 A. We were able to buy azoxy from competing companies cheaper
17 than Willowood would sell us directly.

18 Q. Were you done with Willowood?

19 A. We were buying product on the outside because Willowood
20 was selling it much cheaper.

21 Q. To whom?

22 A. Out of a plant through other dealers. So we were able to
23 buy Willowood stuff cheaper on the outside, which I did not
24 like. They were selling products very cheaply in the
25 marketplace to other people.

1 Q. And at some point, did FMC offer to sell you product --
2 azoxystrobin product at a price less than \$90?

3 A. They did.

4 Q. In fact, they offered to sell it to you at \$80, did they
5 not?

6 A. They did. They were getting out of the business
7 completely.

8 Q. And did you purchase more product at \$80 from them?

9 A. I did not. The seeding was over.

10 Q. So this was by the fall?

11 A. I do not remember when he offered, but it was after the
12 seeding was over.

13 Q. But before I start, Mr. Neuman had mentioned that you had
14 a couple of calls with him prior to this deposition; is that
15 right?

16 A. That's correct.

17 Q. How many of these calls did you have?

18 A. I think Mr. Neuman called me three times.

19 Q. Okay.

20 A. I'm not -- I don't know for sure, but two to three times.

21 Q. Do you remember when those calls were?

22 A. They've been over three weeks ago, three, four weeks ago.

23 Q. Do you remember what was generally discussed on those
24 calls?

25 A. Basically everything to do with these documents.

1 Q. Now, Mr. Reichman (sic), is that a distributor or a
2 retailer? Or excuse me.

3 Now, Reichman, is that a distributor or a retailer?

4 A. We are both. We sell to farmers and dealer.

5 Q. When you say "dealers," do you mean wholesalers?

6 A. Yes, other small wholesale outlets.

7 Q. Now, Mr. Neuman asked you a little bit earlier how you
8 first became engaged with Willowood. Do you recall whether it
9 was you that reached out to Willowood regarding azoxystrobin
10 products, or was it Willowood that reached out to you?

11 A. We already had a relationship buying other product from
12 Willowood, so it was just kind of a natural -- they just
13 brought the product to us as another offering.

14 Q. Okay. So Willowood came to you with a new product?

15 A. Yes.

16 Q. Okay. How -- can you describe -- can you describe how
17 Willowood priced its products? Was there a method by which
18 they priced their products?

19 A. Willowood is just notorious just to -- everything they
20 bring in is that product usually goes way down in value when
21 Willowood brings it. So how they price it, I don't know, but
22 it -- usually, when Willowood comes in with a product, you know
23 that product is going to the basement floor on pricing.

24 Q. What's your basis for that?

25 A. It is just their track record. You could probably ask

1 anybody in the business and you'll get the same answer.

2 Q. What is Willowood's reputation in the industry?

3 A. Just like that. It's -- it's a -- it's a company that
4 when -- like I said, when they bring a product, you know we're
5 going to the floor. We're going to the basement. They
6 are -- it's --

7 Q. Does Willowood have a reputation in terms of the quality
8 of their products?

9 A. The quality is good. There's no problem with that.

10 Q. So the actual net price that Willowood had offered you on
11 REI 61 was \$25 minus 25 --

12 THE COURT: I think you misspoke there. \$125, didn't
13 it say?

14 BY MR. COUGHLIN:

15 Q. \$125 minus \$25 resulting in \$100 net price; is that right?

16 A. That is correct.

17 Q. That was the net price you were purchasing -- or,
18 Willowood was proposing that you purchase Azoxy 2SC as of
19 October 17, 2014; is that right?

20 A. That's correct.

21 Q. If you can, take a look at that same page, REI 61, where
22 it says 21,600 gallons, Willowood AzoxyProp, unit price 90.

23 Do you see that?

24 A. Yes.

25 Q. Willowood was proposing as of October 14 (sic) that

1 Reichman purchase 21,600 gallons at unit price of \$90 per
2 gallon; is that correct?

3 A. That's what they were proposing, yes.

4 Q. Do you recall if there were any rebates to that \$90?

5 A. I do not believe at that time there was anything -- there
6 was any rebates to that product at that point.

7 Q. Was there a rebate later that Willowood offered for
8 AzoxyProp?

9 A. I believe they gave me something off the product. I do
10 not recall the details, but we broke down and, you know, ended
11 up splitting ways, and I was actually buying the product from
12 another source cheaper than what Willowood was selling me
13 directly.

14 Q. Okay. So you were able to buy AzoxyProp Xtra for cheaper
15 than \$90 from another source to whom Willowood had sold
16 AzoxyProp?

17 A. That's correct.

18 Q. Do you recall when you were able to buy cheaper than --
19 AzoxyProp cheaper than \$90?

20 A. Yeah. It was in the summer of 2015.

21 Q. As of February 15, 2015, Willowood was offering AzoxyProp
22 Xtra, along with other offers, to lower your net price to
23 \$79.58 based on an invoice price of \$78.33 based on a retail
24 price; is that right?

25 A. Yes.

1 Q. Understood. If you turn to REI 36, there's an e-mail
2 there at the top from Brian Heinze of Willowood USA to you and
3 Andy King.

4 Do you see that?

5 A. Yes.

6 Q. And that's dated October 20, 2014.

7 Do you see that?

8 A. Yep.

9 Q. And then below there there's another -- there's an e-mail
10 from Andy King to you copying Joe Meddione and Brian Heinze
11 also dated October 20, 2014.

12 Do you see that?

13 A. Yes.

14 Q. Do you know who Joe Meddione is?

15 A. He's also an owner of Willowood.

16 Q. Okay. Do you understand Brian Heinze is the -- is the CEO
17 or president of Willowood USA?

18 A. Yes.

19 Q. In his e-mail to you on page REI 36, Mr. King states, All
20 we can do is continue to tell everyone that these fighting
21 brands would not exist if it weren't for generics.

22 Do you see that?

23 A. Yes.

24 Q. Your understanding is that when he says "fighting brands"
25 he's referring to Syngenta's Aframe product, right?

1 A. Right.

2 Q. Do you know what he means by "all we can do is continue to
3 tell every one that these fighting brands would not exist if it
4 weren't for generics"?

5 A. I believe he's just saying that, you know, Syngenta would
6 never come up with a brown box label if it wasn't for them
7 putting out their product.

8 Q. Was it your understanding that Syngenta came out with a
9 fighting brand called Aframe because of Willowood in the
10 marketplace?

11 A. I believe, yes, Syngenta and every other company usually
12 comes out with a fighting brand when there's a generic. Not
13 always, but it happens.

14 Q. When Mr. Neuman asked you about the active ingredients,
15 you had indicated that it's the same active ingredient in
16 Equation and Azaka?

17 A. That's correct.

18 Q. Do you know why Cheminova would have two products with the
19 same active ingredient?

20 A. They made two products because that's what Syngenta had.
21 Syngenta had Quadris, and they had Abound. Quadris was a
22 higher priced product for a different market, and Abound was a
23 cheaper version of the same thing for a different market, but
24 they did not have the same labels. So that's what Cheminova
25 did. They followed the practice of Syngenta. Now, Willowood

1 destroyed it by making one label. So instead of having a \$200
2 product and a \$120 product, they made one, and you know where
3 it goes; it goes to the lowest price.

4 Q. It was a race to the bottom in price?

5 A. Exactly.

6 Q. Now, are you aware that Equation -- the label for
7 Cheminova's Equation product did not have corn or tobacco on
8 the label?

9 A. To begin with, it didn't.

10 Q. Okay.

11 A. But then it did receive a corn label.

12 Q. But as of 2014 when Cheminova was reaching out to --

13 A. You're correct. It did not have a corn label that year.

14 Q. Azaka you indicated was comparable to Syngenta's Abound
15 product?

16 A. Abound, yes.

17 Q. Do you have a sense of which crops that Azaka was directed
18 to?

19 A. I don't have -- I'm not hugely familiar with it, but I
20 think it was more like in the tobacco and -- it was a
21 southern-based product, so it was something that we really
22 didn't have a lot of need for, but I did sell some of the Azaka
23 in the southern market.

24 Q. Okay. Is it your understanding that the growers need to
25 follow the labels on pesticides products?

1 A. Yes, they need to follow the label.

2 Q. What's your understanding as to the consequences of not
3 following the labels?

4 A. You know, you can be fined pretty heavily if you're not
5 following labels.

6 Q. And Reichman wasn't in the practice of selling Equation
7 and Azaka for off-label use, correct?

8 A. Say that again.

9 Q. Reichman was not telling growers and wholesalers to use
10 Equation and Azaka for off-label use?

11 A. No. No.

12 Q. And the lowest price that Willowood offered or at least
13 one price that Willowood offered in 2014 was \$100?

14 A. I believe that's correct, yes.

15 Q. You would agree that Willowood offered a price for its
16 Azoxy 2SC that was at least 50, if not \$55 cheaper than what
17 Cheminova was offering in 2014?

18 A. Yes. They were offering it at a cheaper price.

19 Q. Mr. Reichman, Mr. Neuman tried to suggest to you that the
20 net price of a \$100 that Willowood was offering Azoxy 2SC in
21 2014 might have been in response to something prompted by
22 FMC-Cheminova.

23 Do you recall that question?

24 A. In 2014, it was not to do with FMC. I mean, as I talked
25 to him on the phone earlier, FMC kind of did fall off the radar

1 a little bit -- or, Cheminova before their merger, and so
2 basically my -- to get \$100, I negotiated that, basically.

3 Q. The \$100 that you negotiated was -- had nothing do with
4 prices that Cheminova was offering the marketplace?

5 A. Cheminova really wasn't offering anything at the moment.

6 Q. The only documents that you -- Reichman has produced
7 regarding Cheminova from 2014 reflect a net price of 150 to
8 \$155; is that right?

9 A. Yes. When they were Cheminova, I believe it was 150 and
10 155 both, correct?

11 Q. Correct.

12 A. Yeah.

13 Q. There were no documents that you found or were able to
14 locate at Reichman that reflect a lower net price from
15 Cheminova from 2014, correct?

16 A. Not -- no, not on that product, no.

17 Q. And in 2015 I were negotiating with Willowood as you were
18 disengaging from them, correct?

19 A. That's correct.

20 Q. And that's when you were telling Willowood that you could
21 get \$100 a gallon from FMC on better terms, correct?

22 A. That was later than 2015 in the summer, correct.

23 (Deposition of Brad Reichman concluded.)

24 MR. COUGHLIN: That's all, Your Honor.

25 THE COURT: All right. Please step down.

1 You can call your next witness.

2 MR. SANTHANAM: Yes, Your Honor. We call
3 Dr. Benjamin Wilner to the stand.

4 (Witness sworn by the clerk.)

5 MR. SANTHANAM: Your Honor, we have courtesy binders
6 prepared as well for Dr. Wilner.

7 THE COURT: Okay. You can proceed when you are
8 ready.

9 BENJAMIN S. WILNER,

10 PLAINTIFF'S WITNESS, SWORN AT 10:15 A.M.

11 DIRECT EXAMINATION

12 | BY MR. SANTHANAM:

13 Q. Good morning, Dr. Wilner. Would you --

14 A. Good morning.

15 Q. Would you please state your full name f

16 A. Dr. Benjamin

17 wilner is w-i-l-n-e-r And I want to apologize that as

18 Dr. Wichert and Dr. Whitton have testified before me, I'm the
19 third Dr. W that you've heard in this case.

— 3 —

22 Alvarez & Marsal.

15. Where do you do your shopping and research?

25 experience doing economic, financial, and statistical

1 consulting.

2 Q. Without getting into the details, would you tell us
3 generally why you are here today?

4 A. I was retained to calculate the damages that Syngenta
5 suffered because of Willowood's actions and calculate the
6 amount of money that should be owed to adequately compensate
7 Syngenta for such actions.

8 Q. Are you being compensated for your work on this case?

9 A. My firm is being compensated for my work; and as a partner
10 in the firm, I receive some of that money.

11 Q. And what is the rate that your firm charges?

12 A. My firm receives \$595 an hour, irrespective of the results
13 this case.

14 Q. Dr. Wilner, I'd like to start by talking about your
15 background and qualifications. Can you tell us a little bit
16 about your education?

17 A. Sure. So I actually have two undergraduate degrees. I
18 have a general course degree in mathematics and statistics from
19 the London School of Economics in London, England. I have a
20 bachelor of arts degree, magna cum laude with distinction, and
21 a major in mathematics and economics from the University of
22 Pennsylvania in Philadelphia. And then I have a Ph.D., or
23 doctorate, which means I've completed a bunch of course work
24 and then wrote a dissertation of unique research that was
25 accepted by a committee of professors at the Kellogg Graduate

1 Schools of Management and Northwestern University and that --
2 my field of study was something called managerial economics and
3 decision science.

4 Q. Dr. Wilner, have you had any teaching engagements?

5 A. I have. I was a professor of finance and a professor of
6 statistics at the University of Iowa. I was a visiting
7 assistant professor of finance at the University of Michigan.
8 I was an instructor in decision science and a visiting
9 professor of finance at Northwestern University. And then I
10 taught overseas for a little bit where I was a visiting
11 professor of economics at the Helsinki School of Economics in
12 Finland.

13 Q. Now, Dr. Wilner, have you had any mentors over the course
14 of your education and background?

15 A. I have. I've been very lucky to have several great
16 mentors, and in particular I'd like to highlight four of them.
17 First, I spent three years working for a gentleman who won the
18 Nobel Prize in economics for statistical modeling and
19 statistical forecasting in economics.

20 Secondly, I work -- I studied under another Nobel
21 Prize winner who won for his study of labor markets, how people
22 are employed and how companies interact with their employees.

23 Thirdly, I studied under a third Nobel Prize winning
24 economist who won the Nobel Prize for his study of how markets
25 work.

1 Then the president of the University of Chicago, he
2 read my senior thesis that I wrote in college, and he used that
3 as a theoretical basis behind one of his research papers.

4 Q. Over the course of your education and in your career, have
5 you received any awards?

6 A. I have. I've received both academic awards, as well as
7 professional awards.

8 Q. Can you tell us about your academic awards.

9 A. Sure. So it's -- in addition to teaching awards and
10 research grants from various universities, I received a grant
11 from the US Government's National Science Foundation for my
12 study of how prices are set in various markets.

13 Q. Can you tell us about your professional awards?

14 A. Sure. So it's -- last year I received a special
15 commendation from the commissioner of US Customs and Border
16 Protection for helping them redesign a \$2.5 billion a year
17 tariff, that's billion with a B. And in -- and what that
18 tariff covered is all products that are imported into the
19 United States, including some of the imports that you've heard
20 about here in this case.

21 In addition, in another project for Customs and
22 Border Protection, I helped Customs and Border Protection
23 economically analyze speeding up the process to bring in
24 agricultural goods into the United States.

25 MR. SANTHANAM: Your Honor, at this time we'd tender

1 Dr. Benjamin Wilner as an expert in economics.

2 THE COURT: Does the Defendant have questions about
3 his qualifications?

4 MR. NEUMAN: No objection; not at this time, Your
5 Honor.

6 THE COURT: All right. He may so testify.

7 BY MR. SANTHANAM:

8 Q. Dr. Wilner, in connection with this case, have you reached
9 any opinions?

10 A. I have.

11 Q. And in preparing to testify in this case, did you prepare
12 any materials to help you explain your opinions?

13 A. I did.

14 Q. In the binder before you, would you turn to the first tab
15 in that binder?

16 A. Actually I apologize. I do not have a binder.

17 MR. SANTHANAM: Permission to approach, Your Honor?

18 THE COURT: You may.

19 BY MR. SANTHANAM:

20 Q. Dr. Wilner, will you turn to the first tab in that binder?

21 A. Yes.

22 Q. And does this tab contain what -- this tab contains what
23 has been marked as Plaintiff's Demonstrative Exhibit 10. Are
24 these materials that you prepared?

25 A. Yes, they are.

1 Q. What was the process by which you prepared these
2 materials?

3 A. So I have a staff of about three or four people that
4 assisted me on this project, and working in concert with them,
5 we summarized the opinions I generated from the research I did
6 in this case, and we condensed it into the slide presentation
7 shown behind Tab 1.

8 Q. Do these demonstrative slides fairly and accurately
9 summarize the work that you've done on this case and your
10 opinions?

11 A. They do.

12 Q. Do you believe that they will help you in explaining your
13 opinions to the jury clearly and efficiently?

14 A. As I'm dealing with damages, and there are lots of
15 numbers, yes, I do.

16 MR. SANTHANAM: Your Honor, permission to show
17 Plaintiff's Demonstrative Exhibit 10 to the jury.

18 MR. NEUMAN: No objection.

19 THE COURT: All right. You may proceed.

20 MR. SANTHANAM: Your Honor, since this is a slide
21 deck that Dr. Wilner has prepared, I'm hoping to give him a
22 clicker so that he can advance through the slides. Is that
23 appropriate?

24 THE COURT: All right. As long as you're asking him
25 questions.

1 MR. SANTHANAM: Correct. Permission to approach?

2 THE COURT: Yes.

3 THE WITNESS: Thank you.

4 BY MR. SANTHANAM:

5 Q. Dr. Wilner, you mentioned that you reached an opinion in
6 this case. What is that opinion?

7 A. So it is my conclusion that Syngenta suffered damages in
8 the form of lost profits of at least \$75.6 million.

9 Q. Briefly, Dr. Wilner, would you describe for us the
10 materials that you considered in reaching this opinion.

11 A. Yes, I can. There's several types of documents that I
12 looked at. I first started by looking at Syngenta's actual and
13 budgeted sales and profits, so these are financial documents;
14 some of which you have seen before, and this presents how much
15 Syngenta sold, how much it cost them to make those sales;
16 profits, prices, et cetera.

17 Q. What else did you consider?

18 A. So it's -- those are just numbers, and while I deal with a
19 lot of numbers, I also want to understand the context behind
20 those numbers, so I looked at internal business presentations
21 and correspondence that Syngenta had which gave color to those
22 financial numbers, and then I supplemented those Syngenta
23 documents with similar documents from Willowood.

24 Q. Did you speak with anyone?

25 A. I did. So it's both the profit financial data as well as

1 the presentations or correspondence, those are just documents,
2 but I had some questions about the documents so I discussed
3 things with Syngenta personnel. I talked to people throughout
4 the organization. People who made azoxystrobin as well as
5 other products.

6 I talked to people in sales and marketing of
7 azoxystrobin as well as other products, and I talked to people
8 in finance, people who compiled all of the numbers to get an
9 understanding of things. And from those questions that I asked
10 of them, additional documents and data and presentations and
11 correspondence were sent to me, which further enhanced my
12 knowledge of the market and the products at issue.

13 Q. You know, Dr. Wilner, you said that you have a small team
14 that you work with, and when you say you spoke with people, did
15 you personally speak with the individuals in Syngenta?

16 A. I did.

17 Q. Did you conduct any independent research of your own?

18 A. I did. So in addition to these documents and discussions
19 that I had, I looked at many depositions. You've seen many
20 deposition transcripts and many videos. We read all of the
21 depositions where people knowledgeable about this case provided
22 information, so I reviewed that.

23 And but I -- while all of those documents were
24 provided as part of the case, we went and we did our own
25 independent research, going out and furthering studying the

1 azoxystrobin agrochemical market and obtained more information
2 to round out what was in the documents and discussions with
3 Syngenta and other information.

4 Q. Now, Dr. Wilner, we've been hearing testimony from various
5 witnesses since Tuesday. Have you been in the courtroom
6 observing that testimony?

7 A. Been sitting right back there.

8 Q. Now, you talked about the materials you've considered.
9 Can you tell us the method by which you reviewed these
10 materials and came to your opinions.

11 A. Sure. So what I did was a three-step process. First, I
12 analyzed background information on the products and the
13 industry to understand what's going on. And then once I
14 understood the products and the industry, I then calculated
15 damages, but I didn't stop after I calculated damages. I
16 performed additional steps to insure that my calculations made
17 sense, so I validated them.

18 Q. Let's start with the background that you reviewed. What
19 did you review and rely on in terms of background information?

20 A. So obviously the first thing I had to learn about was
21 azoxystrobin. I'm sure that's a new word that you all heard
22 earlier this week, so I'll admit it was a new word to me, so I
23 had to learn about it. And one of the things that I learned is
24 that azoxy's a fungicide that prevents major fungi from harming
25 plants, and it's used in a wide variety of crops, most

1 particularly, corn, but other products as well, such as soy,
2 wheat, tobacco, et cetera.

3 Q. Are there other benefits to azoxy that you observed?

4 A. Yes. And so it's as you have heard a lot about first
5 introduced by Mr. Cecil, that not only is azoxy a fungicide,
6 but it's a crop-enhancement product. And what that
7 crop-enhancement product does is it strengthens the plant. It
8 makes the plant stronger so that it can grow longer and not dry
9 out as the season ends, and because it doesn't dry out, it
10 allows the crop to grow longer and the yield increases.

11 I think Mr. Cecil testified that you can get, I think
12 he used the example of 16 bushels per acre more by using that.
13 So that benefit occurs even if there's no disease in the field,
14 and that additional benefit of getting, in his example,
15 16 bushels per acre, causes great benefit to the farmer. I saw
16 evidence that there's up to three -- two to three times return
17 on investment from putting azoxy on. The cost of azoxy is
18 outweighed by two or three times the additional yield.

19 Q. Dr. Wilner, in terms of Syngenta's business, how did you
20 assess Syngenta's azoxystrobin products compared to its
21 business?

22 A. So it's -- I found that azoxy is Syngenta's largest
23 selling product worldwide, and so this is a major product for
24 Syngenta, and that's one of the reasons why we're here is
25 because they care about it a lot.

1 THE COURT: Okay. Next question.

2 BY MR. SANTHANAM:

3 Q. Now, Dr. Wilner, what azoxystrobin products from Syngenta
4 did you look at?

5 A. Sure. So azoxystrobin has four different major uses.

6 THE COURT: What was your question?

7 BY MR. SANTHANAM:

8 Q. What azoxystrobin products from Syngenta did you look at?

9 THE COURT: Okay. Answer that question.

10 THE WITNESS: So it's -- I looked at products that
11 are particularly defined for different markets. You have
12 product that are defined for the crop protection market, so
13 this is where the product is applied by the farmer after
14 planting.

15 You have seed care, and seed care is where the
16 product is put on the seed before planting. Also, you've heard
17 testimony that some products are used specifically for the lawn
18 and garden market by -- and used by golf courses and growers,
19 and then this azoxystrobin can control mildew, so people who
20 manufacture paper and wallboards also find benefit from putting
21 azoxy in their paper.

22 Q. Now, you've listed for us four different types of
23 azoxystrobin uses or products. Did you focus on any particular
24 use as part of your analysis in this case?

25 A. Yes, I did. My analysis primary focuses on the

1 crop-protection market, so where I looked -- primarily looked
2 at only the products that are applied by the farmer after
3 planting.

4 Q. Did you look at Syngenta's brand ladder and the types of
5 products it uses -- offers for crop protection?

6 A. Yes, I did. And so the slide has been presented before in
7 different forms, and so as of 2014, Syngenta had three
8 different steps and three different rungs on the brand ladder.
9 And they have various brands which are there to attract
10 different types of farmers who want different kinds of uses.

11 An analogy that I like to give is if you think about
12 General Motors. General Motors have multiple brands of cars.
13 For example, they have Chevrolet, they have Cadillac and they
14 have GMC as examples. If someone -- Chevrolet is primarily
15 going after customers who want a good quality but standard car.
16 Cadillac is there for people who want a more luxury product,
17 and GMC is there for people who want generally a truck. So
18 that similarly to how General Motors goes and builds products
19 and brands to provide benefits to people who want different
20 things, Syngenta does the same thing.

21 Q. Can you explain how.

22 A. So it's that -- for example, some -- just some farmers
23 want kind of just like Chevrolet, a good quality standard
24 product. Some want more luxury or enhanced products, such as
25 Quadris Top, Quadris Top SB, or Quadris SBX, and some want

1 combinations where you can take an azoxystrobin product, like
2 Quilt Xcel, and mix it with something else. You've heard about
3 mixtures with mesotrione before, and here we have an example of
4 a mixture with Endigo, which is an insecticide.

5 Q. Now, Dr. Wilner, you've got three rungs of a ladder here.
6 Did you look at whether Syngenta introduced other products?

7 A. Yes, I did. As you heard the testimony before, Quilt and
8 Quadris used to be at the top of the ladder, but as time has
9 evolved, and as these products have become more known in the
10 market, they've fallen down on the ladder. So it's -- in order
11 for Syngenta to have a full range of products to provide needs
12 for the variety of farmers, they oftentimes expand their brand
13 ladder.

14 Q. Can you explain how.

15 A. So it's whereas this here shows Syngenta's azoxy products
16 as of 2014, that Syngenta regularly improves and that in 2016,
17 they introduced Trivapro and Elatus, which are the next rung up
18 on the ladder.

19 Q. How did that fit into your analysis of Syngenta's
20 products?

21 A. So it's that -- this is like an -- this brand ladder is
22 kind of like a ladder you might have at home, in that Syngenta
23 spends a lot of time figuring out where the rungs on the ladder
24 need to be. And if the rungs of the ladder are too far apart,
25 just like your ladder at home, you can't climb it, and it's not

1 that useful. The rungs need to be properly placed and moved
2 together. You can't just move one rung, because just like your
3 ladder at home, it won't work.

4 Q. Dr. Wilner, you've talked about brand ladder. Can you
5 tell us if you've examined the patents that Syngenta asserts in
6 this case?

7 A. Yes, I have. And since we've heard a lot about patents,
8 and there are four patents that are at issue in this case, and
9 I have the patent numbers listed in the left column. And while
10 these numbers are in the 5 million, 8 million, as you have
11 heard, that in general, patents are referred to by the last
12 three numbers, so -- of the patents, which I've highlighted.
13 So we have the '076, and '256 compound patents, the '138
14 process patent, and the '761 DABCO patent.

15 Q. What is the significance, if any, of the expiration dates
16 of these patents?

17 A. So it's that you can see I have the expiration dates for
18 these patents in the far right column, and let me talk about
19 expiration as an economist. And so as an economist, a patent
20 gives the patent holder an exclusivity, so that the patent
21 holder can sell the product or utilize a process exclusively.
22 And so as you might think about it, just economically, if
23 someone has an exclusive, in general prices are higher for an
24 exclusive than for a product that everyone might have.

25 Q. And what is the impact of a patent expiration?

1 A. So it's that, as you can see from this chart, the '076 and
2 '256 compound patents expired in February of 2014, which means
3 Syngenta had an exclusive over the products through 2014.

4 After February 2014, generics and other companies
5 could legally sell the products so there's no longer an
6 exclusive. Similarly, Syngenta had an exclusive over the
7 process specified in the '138 patent through December of 2015,
8 22 months later, and then 25 years later, they -- Syngenta had
9 the exclusive over using the '761 DABCO patent.

10 Q. Now, Dr. Wilner, we've talked about, you know, looking at
11 the Syngenta products and the patents. Did you examine how
12 Syngenta manages its product life cycle?

13 A. I did.

14 Q. Can you explain how.

15 A. So it's just -- well, the live person before me was
16 Dr. Wichert, and one of the things that you might recall is
17 that one of his prior positions was he was -- again, I forgot
18 the title, but he was in charge of post-patent strategy. So
19 it's that as we talked about, patent -- when patents come
20 expire, that other companies can come in with similar products
21 or processes, so Syngenta has a whole team that is set up to
22 just deal with this -- a product life cycle time where patents
23 expire and after they expire.

24 Q. Now, Dr. Wilner, in terms of -- I'd like to jump ahead and
25 talk a little bit about the analysis that you performed in this

1 case. Can you describe how you went about calculating damages
2 and the approach that you took.

3 A. Sure. So it's -- how I calculated damages, I'm sorry?

4 Q. Yes.

5 A. Okay. So what I did is, I calculated the damages that
6 were adequate to compensate Syngenta for the infringement that
7 Willowood did, and so I focused in this case on lost profit
8 damages, and in order to calculate lost profit damages, you
9 need to calculate the additional profits that Syngenta would
10 have earned had Willowood not infringed.

11 In economic terms, we call this the but-for economic
12 scenario. So but-for Willowood's infringement and alleged
13 infringement, what profits would Syngenta have made?

14 Q. How did you go about calculating lost profits?

15 A. So it's -- what I did is I used a simple, straightforward
16 formula. In order to calculate the additional profits Syngenta
17 would have made but-for Willowood's infringement, I calculated
18 the but-for profits, how much Syngenta would have made had the
19 infringement not occurred minus the actual profits. And that
20 difference and that subtraction gets you to lost profits.

21 Q. And you've told us about the formula, but what was the
22 method you used with this formula to calculate lost profits?

23 A. So it's because the but-for economic scenario didn't
24 happen, you need to build an economic model to calculate what
25 those but-for profits would be and what reasonably would have

1 happened had Willowood not infringed or entered early. And so,
2 in particular, I use what is called the Benchmark Method.

3 Q. Can you tell us what the Benchmark Method is?

4 A. So what the Benchmark Method is, is where you utilize
5 something similar to value the thing that you want to do. As
6 an example, you might think about a home appraisal. So you
7 might have to have your home valued for some reason. And so
8 what that appraiser does is it uses potentially two different
9 benchmarks to value your home.

10 First, they go and they look at well, what do other
11 homes in your neighborhood sell for? And they say, okay, this
12 home is comparable to your home, and so they can value it like
13 that.

14 But one thing that might happen is you might have an
15 additional bathroom or a finished basement, which makes your
16 house maybe a little bit different than your neighbor's house.
17 So it's -- the house appraiser uses a benchmark to say, well,
18 how much is an additional bathroom worth, how much is a
19 finished basement worth. And through that two, maybe
20 a three-step process, the home appraiser comes up with the value
21 of a home. And so I used a similar process for -- in this
22 case.

23 Q. Can you tell us what the purpose of using a benchmark in
24 this case is?

25 A. Sure. So it's -- what you want to do is you want to use

1 the benchmarks to reasonably -- to reflect what reasonably
2 would have happened in the but-for scenario without Will -- in
3 essence, what would happen without Willowood's infringement or
4 entering early.

5 As you have heard before, Willowood's infringement
6 and entering early caused Syngenta to lose sales, and also,
7 caused them to drop price. And economically, we call it a
8 price drop, price erosion.

9 Q. Now, Dr. Wilner, what makes a good benchmark?

10 A. So what you want to do is you want to have a benchmark be
11 sufficiently similar to the product at issue. So just like in
12 the home appraisal. The home appraiser picks homes that are
13 similar to the home that you might have, but because I am using
14 this to measure the but-for scenario, what would have happened
15 without Willowood's infringement, I need to use a benchmark
16 that doesn't have Willowood's infringement baked into it now.

17 Q. What were the benchmarks that you used to calculate lost
18 profits?

19 A. So it's just like the home appraiser. I utilized two
20 benchmarks to estimate Syngenta's but-for -- what Syngenta's
21 but-for profits would have been had Willowood not infringed or
22 entered early. And those two -- first, I used Syngenta's
23 azoxystrobin budget, and then secondly, I used the differences
24 between budgeted and actual mesotrione, or meso, profits.

25 Q. Let's talk about that first benchmark, azoxy budget. Can

1 you tell us about it?

2 A. Yes. So it's -- I started with 2014 azoxystrobin budgets.
3 And, as Mr. Cecil testified earlier, these 2014 budgets were
4 created just before Syngenta learned about Willowood's
5 infringement.

6 Q. And did you take into account the budgetary process?

7 A. Yes. So it's that -- as Mr. Cecil and as Dr. Wichert and
8 Mr. Fisher testified earlier, in that Syngenta has a very
9 exacting budgeting process. It's an 18-month process to
10 determine what the budgets will be for a given year. There's
11 peer reviews. There's multiple levels of people who will
12 review it. There are -- and those people who review it have 10
13 plus years of experience in the industry, so they know about
14 what is going on.

15 And that because you have the peer-review process
16 where the azoxy product lead talks to the meso product lead,
17 that they insure that there's consistency between the various
18 budgets.

19 Q. Can you tell us about the azoxy budgets that you did use?

20 A. Sure. So it's -- again, I started with -- so I used
21 budgets for each year that I calculated damages. I calculated
22 damages for 2014, 2015, 2016, and 2017. And I started with the
23 2014 budgets, which, as I said before, were which were the last
24 budgets or forecasts Syngenta created prior to their knowledge
25 about Willowood's planned entry.

1 Q. What does the azoxy budget as a benchmark accomplish?

2 What was the purpose of using it?

3 A. So it's that because of these -- and starting with the
4 2014 budget, this was created before the knowledge of
5 Willowood's infringement. This isolates the impact of
6 Willowood's infringement.

7 Furthermore, as you have heard about the detailed
8 process behind the budget, this isolates the economic market
9 factors affecting the agriculture industry. And also, it
10 accounts for the standard product life cycle. It's known that
11 azoxystrobin was going come off patent with regards to the
12 compound patents in 2014, and so Dr. Wichert and his
13 post-patent strategy team got involved and used their standard
14 playbook, used the pillars of the post-patent strategy to --
15 and incorporated them in the budgets.

16 Q. Let's talk about the second benchmark.

17 THE COURT: I think, before we do that, we'll take
18 our morning recess. Might be a good point here.

19 So, ladies and gentlemen, I'll excuse you for 15
20 minutes. Please remember not to talk about the case among
21 yourselves or with anyone else. Don't have any contact with
22 the lawyers, parties, or witnesses.

23 Leave your notes in your chair and come back at
24 11:00. The jury is excused. If everyone will remain seated
25 while they step out.

1 || (Jury panel excused.)

2 THE COURT: Okay. Anything we need to take up before
3 the jury comes in? I know when -- this was very first thing
4 this morning when Dr. Wichert was on the stand, Syngenta asked
5 for a bench conference, but I felt like I had already heard
6 from you, and I was going to rule in your favor, so I didn't
7 feel like I needed the bench conference. I'll just say that's
8 why I wouldn't do it.

9 Is there anything anybody wants to say or do or ask
10 or raise? No? All right. We'll take a 15-minute recess.

11 || (At 10:47 a.m., break taken.)

12 || (At 11:00 a.m., break concluded.)

13 THE COURT: Anything we need to take up before the
14 jury comes in?

15 MR. TILLER: No, Your Honor.

16 MR. LEVINE: No, Your Honor.

17 THE COURT: No? Okay. You can bring the jury in.
18 It's gotten kind of cold in here again, hasn't it?

19 MR. TILLER: Better than the alternative.

20 (Discussion held off the record.)

21 ||| (At 11:02 a.m., jury returned.)

22 THE COURT: Okay. I believe we're ready to continue.
23 So Mr. Santhanam you can continue with Dr. Wilner

24 BY MR SANTHANAM:

25 Q. Dr. Wilner, where we left off before the break was you

1 were discussing the first benchmark, the azoxy budgets, that
2 you used. I'd like to now talk about the second benchmark that
3 you used with respect to meso. Can you tell us, first of all,
4 what mesotrione is?

5 A. Sure. So, as you heard before, mesotrione, or meso, is
6 one of Syngenta's best-selling herbicides.

7 Q. And how did you use mesotrione as a benchmark in this
8 case?

9 A. So it's -- that one of the important things about
10 mesotrione is that it contemporaneously came off of exclusivity
11 around the same time as azoxystrobin -- the azoxystrobin
12 compound patents in the mid to early 2014 time frame.

13 Q. And why is that relevant?

14 A. So it's that Dr. Wichert's post-patent strategy team was
15 involved in establishing the budgets for both azoxystrobin and
16 mesotrione. And as he talked about, you have the various
17 pillars behind that strategy, and they were incorporated into
18 both budgets.

19 Q. Did you look at the markets in which mesotrione and
20 azoxystrobin are offered in?

21 A. Yes. So both products are offered on a variety of crops,
22 both, primarily corn; and also, as was testified before by
23 Dr. Wichert and others is that these products are oftentimes
24 mixed in a -- while sold separately, they're functionally
25 similar as -- they have a functional relationship as farmers

1 mix them together in a tank and spray them simultaneously.

2 Q. Now, you said that meso and azoxy had some similarities up
3 until 2014.

4 THE COURT: Up until what?

5 MR. SANTHANAM: 2014.

6 BY MR. SANTHANAM:

7 Q. Was there a point in which they diverged?

8 A. Yes. So it's that -- one of the things that happened with
9 azoxystrobin is that Syngenta alleges that there was
10 infringement of various patents by Willowood. As Dr. Wichert
11 just testified, there was not such similar infringement on
12 mesotrione. That meso -- that generic competition for
13 mesotrione did not come in till about a year or two later as
14 they standardly see when patents roll off of exclusivity.

15 Q. And were you using mesotrione as a product, itself, as a
16 benchmark, or were you using some other comparison which
17 related to meso?

18 A. Sure. So what I was doing was I was not directly
19 comparing the mesotrione budgets to these azoxystrobin budgets.
20 Instead, what I recognized is that the budgets that were
21 created for azoxystrobin were Syngenta's best understanding of
22 the market at the time. But as we all know, not all budgets
23 are met.

24 So I used the mesotrione budget to take into account
25 the fact that, sometimes, budgets are exceeded; sometimes,

1 budgets are met; sometimes, there's underperformance relative
2 to a budget.

3 Q. Were there other rationales or purposes behind using the
4 mesotrione comparison as a benchmark?

5 A. So, again, what the mesotrione budget did -- and the
6 difference between what actually happened and what was budgeted
7 had for allows for a comparison of what would have happened
8 without the infringement. So, it isolates the impact of
9 Willowood's infringement.

10 And this technique is one of the techniques that when
11 I was working with the Nobel Prize-winning professor for
12 statistical modeling, this is one of the major steps that we
13 employed is using additional benchmarks to supplement our
14 original calculations.

15 Q. Did using mesotrione or the difference between the budgets
16 and actual for mesotrione help account for product life cycle?

17 A. Exactly. Because what it did is that both mesotrione and
18 azoxystrobin were in the same part of the life cycle, so they
19 were dealing with the same post-patent strategy issues in
20 Dr. Wichert's team. And because of that, the -- I analyzed how
21 much to the extent mesotrione either made or did not -- made,
22 exceeded, or underperformed mesotrione's budgets.

23 Q. Did you use the azoxystrobin budget and then adjust your
24 analysis based on the mesotrione budget?

25 A. Exactly. Because the azoxystrobin budget was set up based

1 upon the best knowledge that Syngenta had based upon its 18
2 months of planning, but, as we all know, unexpected things can
3 happen during the year. So this mesotrione budget takes into
4 account unanticipated future economic changes.

5 So just like what I did with Nobel Prize winner and
6 also with the housing example of that sometimes you need to use
7 an extra benchmark to value what a bathroom is worth.

8 Q. Dr. Wilner, we heard earlier about gross-to-net reports?

9 A. Yes.

10 Q. Have you heard that before?

11 A. I have.

12 Q. I'd like you to turn to your binder in the second -- there
13 are a number of different tabs in your binder. If you turn to
14 the third tab, there should be what's in there and it's already
15 been admitted into evidence Plaintiff's Trial 110A, 123A, 140A,
16 and 148A. Do you see those?

17 A. I do.

18 Q. Do you recognize those?

19 A. Yes. These are gross-to-net reports that previously have
20 been discussed in the testimony.

21 MR. NEUMAN: I'm sorry, Counsel, which tabs? I
22 didn't hear you.

23 MR. SANTHANAM: This is Tab 3.

24 MR. NEUMAN: Thank you. I beg your pardon.

25 THE COURT: Go ahead.

1 BY MR. SANTHANAM:

2 Q. Did the -- how did you take into account these
3 gross-to-net reports?

4 A. So it's as I talked about, the budget -- you see, the
5 benchmarks that I utilized, I have the Syngenta budgets, and
6 then I also looked at mesotrione budgets and actual
7 performance. And so all of that information is captured within
8 these gross-to-net reports.

9 Q. Now, Dr. Wilner, we heard earlier today about -- or not
10 today -- yesterday about variations in Syngenta's budgets. And
11 I'd like to talk to you about that.

12 A. Okay.

13 Q. I'd like to put up what has been entered into evidence by
14 Defendants as Defendants' Trial Exhibit 252.

15 MR. SANTHANAM: David, can you put that up?

16 BY MR. SANTHANAM:

17 Q. Now, Dr. Wilner, have you taken a look at the --
18 Syngenta's gross profits and budgeted gross profits, year on
19 year, as reflected here in Defendants' Trial Exhibit 252?

20 A. Yes. As well as the budgeted and actual sales.

21 Q. And to be very clear, did you use the budgets from 2009 to
22 2013 as benchmarks in your analysis?

23 A. No. My analysis solely utilized the 2014, 2015, 2016, and
24 then part of the 2017 budgets.

25 Q. But did you take into account or at least look at the

1 budgets from 2009 through 2013?

2 A. I did.

3 Q. And can you tell us, did you observe any variations in the
4 actuals and budgets in Syngenta's financial records?

5 A. I did. So this is for azoxystrobin, and yes, I do see
6 that.

7 Q. Okay. Now, did you take that into account as part of your
8 analysis?

9 A. I did.

10 Q. How did you do that?

11 A. So it's -- one of the things that I saw is if you look at
12 lines 10 and 11 of this chart, is this is the difference
13 between budgets and actual. And you can see that there are
14 differences, one might say, potentially, sizable differences in
15 the tens of millions of dollars in 2009, 2011 -- 2009, 2010,
16 2011, and 2013.

17 Q. And, Dr. Wilner, did you reach any economic conclusions as
18 to whether the budget variations from 2009, 2010 and 2011 --
19 let's start with those years. Did you reach any economic
20 conclusions as to whether that impacts your use of benchmarks
21 from 2014 onward?

22 A. I did do such analysis.

23 Q. Can you explain?

24 A. Sure. So it's -- I looked at these variances, and said,
25 why are they happening. And one of the things that I needed to

1 assure myself was that -- and question, was this a systematic
2 problem with Syngenta's budgeting process, or could this have
3 been just the result of a one-time event. And I concluded for
4 various reasons that it was the latter; that the reasons for
5 the deviations you see in 2009, 2010, 2011 are because of a
6 one-time event.

7 Q. And what was that one-time event from your economic
8 perspective?

9 A. From my economic perspective, this is what we have known
10 in the public as the Great Recession that was occurring during
11 this time frame.

12 Q. And how would that impact the budgets?

13 A. So it's -- there are three different things that I looked
14 at to go and analyze the -- how the Great Recession affected
15 budgets and actuals during this time frame.

16 Q. You mentioned three things. Let's start first with the
17 first item. What is that?

18 A. Sure. So it's -- first thing is that, as Mr. Cecil
19 testified earlier, that Syngenta, like many companies, had
20 problems doing budgets during the Great Recession because there
21 was just great uncertainty about what was going on. So that
22 was the first thing.

23 Q. What was the second?

24 A. The second thing is, I looked at the research, the papers,
25 and speeches given by a woman named Dr. Christina Romer.

1 Q. Who is Dr. Romer?

2 A. So Dr. Romer, she's currently a professor of, I think,
3 economics -- yes, economics at the University of California
4 Berkeley. But not only does she hold a chair professorship
5 there, but she was a chair of the Council of Economic Advisors
6 in the Obama administration during the time of this recession.
7 So she, in essence, was in charge of the economy.

8 Q. And what role -- what did you look at in terms of
9 Dr. Romer's work?

10 A. So it's -- what Dr. Romer did is she did various analyses
11 of recession and economic downturns. And she found that,
12 overall, budget -- it was very hard to do forecasting during
13 this time frame. And she specifically did analyses of when
14 economic downturns, and she -- during certain economic
15 downturns, it's relatively easy to budget, and in others, it's
16 harder to budget.

17 And based upon the characteristics of the Great
18 Recession that was occurring during this time frame, she
19 concluded that it was very hard to do budgeting in the United
20 States during that time frame.

21 Q. What was the third analysis that you performed?

22 A. So it's -- I am -- as I said, I do various economic
23 consulting. And one bit of economic consulting I do is I serve
24 as an economist for the crop insurance industry. So there's
25 something called crop insurance, which is comparable to your

1 car insurance. So if a bad event happens with your car, an
2 insurance will pay you money.

3 Q. And how does the -- how does insurance play into a role of
4 figuring out whether Syngenta met its budgets?

5 A. Sure. So it's -- there are prices to buy insurance. And
6 these prices are set by the US Department of Agriculture for
7 how much crop insurance costs.

8 And if you look at how the US Department of
9 Agriculture calculated the prices for insurance during this
10 time frame, there was lots of uncertainty baked into these
11 prices. And that meant that even the US Government had trouble
12 forecasting the agricultural economy during this 2009, 2010,
13 2011 time frame.

14 Q. Dr. Wilner, taking all of this into account, what is your
15 economic assessment of Syngenta's budget performance for 2009
16 to 2011?

17 A. So it's -- during this time frame, I, again, go back --
18 went back to my original question. Was the deviations that
19 existed in 2009 to 2011 due to a systematic problem, or was it
20 due to a one-time event. And based upon these three analyses
21 that I performed, I concluded that it was based upon a one-time
22 event as to why this deviation occurred.

23 Q. Let's talk about 2012. Did Syngenta meet its budgets for
24 azoxystrobin in 2012?

25 A. It didn't make the budgets, but as you can see, it was

1 really close. There really was not that much difference.

2 Q. What about 2013?

3 A. 2013, it missed its budgets.

4 Q. And did you -- do you have -- did you make any economic
5 assessment regarding the budget variation in 2013?

6 A. I did.

7 Q. What is that assessment?

8 A. So it's -- to understand what went on in 2013, you
9 actually have to look at 2012 and what happened in 2012. 2012
10 was known as the Great Midwest Drought. I don't know if you
11 even can recall that in the news. And that this drought peaked
12 in July and August of 2012. And literally, just -- crops just
13 died because there wasn't enough water, and so that had various
14 implications which affected why the 2013 budget was missed.

15 Q. Did the timing at which the drought peaked have any
16 impact -- based on your economic analysis, does the timing at
17 which the drought peaked have any significance?

18 A. It does.

19 MR. NEUMAN: Your Honor, may we have a sidebar?

20 THE COURT: Okay.

21 (Bench conference as follows:)

22 MR. NEUMAN: We have heard nothing about the Great
23 Midwestern Drought from Dr. Wilner in his expert report or his
24 deposition. This is all new.

25 MR. SANTHANAM: Your Honor, he's responding to

1 criticisms that are being made of his analysis in his report.
2 Didn't put on -- you know, he based his analysis on budgets,
3 and he presented his opinions in his report. They've offered
4 criticism, so he's responding to those criticisms.

5 MR. DAVIS: I don't know what criticisms it's
6 response to, but this is all new.

7 THE COURT: Well, he means the criticism that he
8 shouldn't be relying on budgets. I assume that's what you're
9 talking about?

10 MR. SANTHANAM: Yes.

11 THE COURT: Okay. You could move along a little
12 faster, but I'll overrule it.

13 (Bench conference concluded.)

14 THE COURT: Go ahead.

15 BY MR. SANTHANAM:

16 Q. Dr. Wilner, can you explain for us the significance of the
17 timing of this drought?

18 A. So, if you remember before Mr. Cecil testified, and he
19 testified and Mr. Fisher also stated that the main time in
20 which farmers apply their azoxystrobin is in July and August of
21 the growth year, and this was right exactly around the time of
22 the peak time in the drought.

23 Q. What did that imply?

24 A. So it's that this -- so if you were a farmer and you were
25 facing a situation, you might not have -- you might have bought

1 azoxystrobin to put on your crops, but because the crops were
2 dead, you didn't. And so as Dr. Whitton -- and you didn't.

3 Q. And did you observe that for a significant portion of
4 azoxystrobin or what extent?

5 A. So it's -- I don't know what happened and Syngenta was
6 unable to tell how many farmers actually applied the
7 azoxystrobin in 2012 and how many farmers didn't because the
8 crops were dead or dying.

9 Q. How did that impact 2013?

10 A. Sure. So as Dr. Whitton testified on the first day, his
11 azoxystrobin is a very stable chemical. You can just put it on
12 the shelf. So that what farmers did is farmers who did not
13 apply the azoxystrobin they purchased in 2012, they just put it
14 on the shelf and then used it the next year in 2013.

15 Q. Did that impact the budgetary -- did that impact the
16 actual sales?

17 A. It did, because Syngenta was unable to measure how many
18 farmers actually just had the bottle on their shelf, so that
19 they had trouble budgeting in 2013 because of that uncertainty.

20 Q. I want to move ahead to 2014 and 2015.

21 Did you make any economic assessments as to
22 budgets -- Syngenta's budgets and the extent to which it made
23 its budgets in 2014 and 2015?

24 A. Yes. As I looked at 2014 and 2015, yes, there was some
25 economic decline. Prices went down for crops during that time

1 frame, which I captured in my benchmark analysis, but can see
2 that in 2014 there's a big decline, a big variance from budgets
3 versus actual, and as I concluded, that was due to Willowood's
4 actions.

5 Q. What about 2015?

6 A. So in 2015, Syngenta had great knowledge about Willowood's
7 activities and planned activities, and it was able to utilize
8 the efforts of Dr. Wichert's post-patent strategy team; and one
9 thing you can see is once they knew what the ground rules were,
10 Syngenta budgeted well.

11 MR. SANTHANAM: David, we can put that away.

12 BY MR. SANTHANAM:

13 Q. Dr. Wilner, I would like to get down to the brass of your
14 calculations and specifically for the calculations you did with
15 respect to the compound patents. Can you jump ahead and tell
16 us how you went about calculating Syngenta's damages with
17 respect to the compound patents?

18 A. Sure. So I calculated damages for the two compound
19 patents together, and I calculated damages by year. First I
20 calculated for 2014 and then for '15, 2016, 2017, and I
21 conservatively stopped there.

22 Q. Let's talk specifically about 2014. What did you do for
23 2014?

24 A. So as I started with my first benchmark, which was the
25 final 2014 azoxystrobin gross profit budget --

1 Q. Why did you start with that budget?

2 A. Because this budget -- as Mr. Cecil testified, this was a
3 budget that was created two to three months before Syngenta
4 garnered knowledge about Willowood's planned infringement. So
5 this budget was created assuming Willowood would not have
6 infringed.

7 Q. Did you make any adjustments to this budget?

8 A. Sure. So the budget started out saying that they expected
9 Syngenta to make \$166.6 million in 2014; but, as we talked
10 about before, some budgets are met, some budgets are exceeded,
11 sometimes you underperform a budget.

12 Q. And what was the adjustment that you made?

13 A. So, here, I utilized a second benchmark where I said,
14 okay, let's look at what happened to meso. Let's compare the
15 actual performance of meso versus a budget, and you know what?
16 Because there was weakness in the agriculture economy in 2014,
17 crop prices fell, farm income fell. Mesotrione missed its 2014
18 budget by roughly 15 percent.

19 Q. And what was the adjustment that you made?

20 A. So it's that I assumed that because meso missed its budget
21 by 15, 16 percent, that azoxystrobin would have missed its
22 budget by 15, 16 percent. So, in particular, I took out
23 roughly \$26 million from the budget.

24 Q. Dr. Wilner, if you did not make this adjustment to your
25 analysis, how would that have impacted your overall damages

1 calculation?

2 A. My damages would have been higher if I did not do this
3 adjustment.

4 Q. What does the blue bar on the right of \$140.9 million
5 reflect?

6 A. So this roughly \$141 million, this is the amount of money
7 I conclude that Syngenta would have made had Willowood not
8 infringed.

9 Q. Is that what you called the "but-for profits"?

10 A. Yes, exactly, but-for profits.

11 Q. How did you go from there, the 140.9 million, to
12 calculating what Syngenta's lost profits were?

13 A. So if you remember my lost profits formula, but-for
14 profits minus actual profits equals lost profits, so that's
15 what I did. I concluded that had Willowood not infringed, the
16 but-for profits would have been \$141. I then went to the
17 gross-to-net reports that were in here and saw that Syngenta
18 actually made roughly \$121 million in 2014.

19 Q. And where did that take you?

20 A. So then using the formula but-for profits minus actual
21 profits equals lost profits, I concluded that Syngenta lost
22 \$20 million in 2014 because of Willowood's actions.

23 Q. Dr. Wilner, we've been talking about how you've applied
24 the benchmarks you used to get to this 20-million-dollar
25 figure. Is there a different way that you can look at this

1 analysis?

2 A. Yes, you can. So the first thing is you can say

3 Syngenta's actual profits were \$121 million, and they should

4 have made -- and their profits would have been 16.6 percent

5 higher in 2014 had Willowood not infringed.

6 Q. Can you show us how you did that?

7 A. So that's the calculation here that's shown here where I

8 just did 20 million divided by 121 million.

9 Q. Did you do any other analyses?

10 A. I did. So if you remember, we started off with the

11 \$166.6 million. That was the final budget, and then the actual

12 was \$120.9 million. So there was a roughly 46-million-dollar

13 shortfall in 2014.

14 Q. Did you attribute that \$45.7 million shortfall to

15 Willowood?

16 A. No, I did not. What I did is I broke up this

17 45-million-dollar shortfall into two components. As you can

18 see, 45 breaks up into two things. So the yellow bar is the

19 shortfall due to forces unrelated to Willowood, and the red bar

20 is the amount of damages due to Willowood.

21 Q. And what type of factors does the \$25.7 million that you

22 say was unrelated to Willowood -- what types of factors does

23 that take into account?

24 A. So the \$25 million relates to additional unanticipated

25 market factors. So, therefore, I conclude that over half of

1 the shortfall that Willowood -- excuse me -- that Syngenta
2 incurred were due to factors unrelated to Willowood and less
3 than half of that shortfall, or \$20 million, was due to
4 Willowood's activities.

5 Q. If you didn't make this adjustment, how would that have
6 impacted your analysis?

7 A. If I didn't make this adjustment, the damages would have
8 been higher.

9 Q. Now, you've taken us through 2014, Dr. Wilner. I'd like
10 to jump ahead to 2015. Can you tell us about the process you
11 went about in calculating damages for 2015?

12 A. Sure. So, again, I utilized a very similar process. I
13 started with the 2015 budgets, which were created in October
14 and November of 2014, and Syngenta budgeted and forecast that
15 they would have made \$99 million in 2015.

16 Q. And where did you go from there?

17 A. So it's important to realize that there is a difference
18 between the 2015 budget and the 2014 budget.

19 MR. SANTHANAM: Your Honor, we'd like to make a
20 correction on the record.

21 THE COURT: Is that right?

22 MR. SANTHANAM: It should say 2015 at the top.

23 THE COURT: Okay. I mean, you might need to ask the
24 witness about that.

25

1 BY MR. SANTHANAM:

2 Q. Is that right?

3 A. No, so this should be 2015 but-for azoxystrobin gross
4 profits. I'm sorry.

5 Q. Dr. Wilner, can you tell us how you went from the budget
6 from 2015 and any adjustments that you made?

7 A. Sure. As I just said, there's a difference between the
8 2014 budgets and the 2015 budgets. In 2014, this was created
9 two to three months before Syngenta knew about Willowood's
10 activities and planned activities. This budget -- the 2015
11 budget was created after Syngenta had knowledge about
12 Willowood's activities and planned activities. So this budget
13 was reduced because it had that knowledge.

14 Q. Did you make any adjustments for that?

15 A. I did. Because what I want to do and what I need to do in
16 deriving this but-for world is determine what the profits would
17 have been had Willowood not infringed. So I need to just add
18 back in the amount of reduction in the budget because of
19 Syngenta's knowledge about Willowood's activities.

20 Q. What was that adjustment?

21 A. So if you recall, I determined that Syngenta would have
22 made 16.6 percent more money in 2014 had Willowood not
23 infringed. So because these 2015 budgets were created with a
24 lot of knowledge about 2014, I conclude that had Willowood not
25 infringed, Syngenta's budgets would have been 16.6 percent

1 higher.

2 Q. Where does that take you?

3 A. So then I need to add back in, which is roughly
4 \$16.4 million -- that I conclude that had Willowood not
5 infringed, Syngenta would have had a budget of \$115.4 million
6 in 2015.

7 Q. Did you make any further adjustments?

8 A. Sure. And then I apologize. There's an error in the top
9 header as well. It should be calculations from the 2015
10 but-for budgets. Sorry about that.

11 So that then this is what the budget -- the budget
12 was 2015 -- I'm sorry, was \$115 million, and as I previously
13 discussed, sometimes budgets are met, sometimes they're
14 exceeded, and sometimes there is underperformance; and while
15 there is underperformance in 2014, there's actually
16 overperformance in 2015.

17 Q. Can you show the adjustment that you made?

18 A. Sure. So I looked at the meso actual and budgeted
19 profits, and I found that meso beat its budget by 2.7 percent.
20 So, therefore, I just added in another 2.7 percent, which was
21 \$3.1 million, to come up with the bar on the far right.

22 Q. What does that blue bar of 118.6 million reflect?

23 A. So what that bar reflects is the amount of profits
24 Syngenta would have earned in 2015 had Willowood not done its
25 infringement or alleged infringement.

1 Q. Now, taking that \$118.6 million figure, how did you go
2 from there to calculating lost profits for 2015?

3 A. Again, what I did was I utilized my lost profits formula.
4 Lost profit formula: But-for profits minus actual profits
5 equals lost profits. But for the infringement, I concluded
6 that Syngenta would have made \$118.6 million. These
7 gross-to-net reports say that Syngenta actually made
8 \$93.6 million. So, therefore, there was roughly a
9 25-million-dollar shortfall in 2015, which was on top of the
10 20-million-dollar loss in 2014.

11 Q. Now, Dr. Wilner, in reaching this, you mentioned that you
12 had applied the benchmarks. Can you explain what those
13 benchmarks accounted for in your 2015 calculation?

14 A. Sure. So it's these accounted for -- and these benchmarks
15 were sufficiently similar to what azoxystrobin was doing --
16 actually did or would have done.

17 So I used one benchmark to look at what -- taking the
18 budgets and all the other economic factors, and then I used the
19 mesotrione deviations from budgets to figure out how in general
20 crops -- the chemicals that were subject to the same budgeting
21 process performed.

22 Q. Now, you've gotten us through 2015. Can you briefly tell
23 us what you did for 2016 and 2017?

24 A. So I utilized the very similar method for 2016 and 2017,
25 but I didn't created graphs with it. I'm happy to if you want

1 to, but I just used a very similar calculation method of using
2 the two benchmarks.

3 Q. Did you do anything else?

4 A. I did. So the important thing to understand is that
5 what -- when I need to calculate the damages that are
6 sufficient to compensate Syngenta for Willowood's actions,
7 that's lost profits. It's not lost sales. What you need to do
8 is you need to figure out what the lost sales are and then
9 subtract out relevant costs; and using the calculation
10 methodology that I did, I was able to mostly do that in one
11 step, but then I had to do something a little bit else.

12 Q. Let's talk about that first. How did you account for
13 costs?

14 A. So if you recall back, when I did the calculations of
15 budgets versus actual, I did not do it on sales. What I did is
16 I did it based upon gross profits; and as Mr. Fisher testified,
17 gross profits take out most of the relevant costs, almost all
18 of the relevant costs for making azoxystrobin.

19 Q. Did you look at additional costs?

20 A. I did. I didn't just stop there. I worked with
21 Syngenta's controller to get additional information about
22 costs, and I found that there was just only a slightly amount
23 of additional costs, really small, that I additionally had to
24 subtract to properly calculate damages. So I went and I did
25 that.

1 Q. Taking into account the costs that you looked at, did you
2 reach an opinion as to the lost profits that Syngenta suffered
3 with respect to the compound patents?

4 A. I did. So as shown in the table here on Slide 39, I
5 calculated profits first for 2014 and then for 2015, then for
6 2016, then for 2017, and I showed the numbers in each year on
7 this chart; and in total, it comprised \$75.6 million.

8 Q. Dr. Wilner, with respect to your calculations, did you
9 look at lost profits after 2017?

10 A. No, I conservatively stopped at 2017. As you can see,
11 there was \$15 million in losses in 2017, which likely means
12 that there were going to be losses in 2018, 2019, 2020, but I
13 conservatively stopped in 2017.

14 Q. Let's talk now about the other patents that you were
15 looking at.

16 So you've gone through compound patents. Did you
17 look at Syngenta's damages with respect to the '138 process
18 patent and the '761 DABC0 patent?

19 A. I did.

20 Q. How did you take that into account?

21 A. So, again, I want to go back to just economically talking
22 about what patents are. Patents give a company an exclusive
23 over a product or a process, and as we talked about, having an
24 exclusive allows you to charge higher prices and make more
25 profits. So the longer that you have an exclusive, the more

1 money the company is going to make.

2 And as you can see here, that under the process
3 patent, Syngenta had an exclusive for another 22 months. Under
4 the DABCO patent, they had an exclusive for another 15 years.
5 So by economic definitions, because Syngenta would have made
6 more money because of the longer exclusivity, the damages for
7 the other two patents must be higher than what I calculated for
8 the compound patents.

9 Q. And, Dr. Wilner, what did you calculate in terms of
10 damages?

11 A. So because of that economic rationale, I concluded that if
12 Willowood infringed on the '138 process patent and/or the '761
13 DABCO patent, I conservatively conclude that Syngenta lost at
14 least \$75.6 million during this four-year time frame, 2014 to
15 2017.

16 Q. And if you could go back a couple of slides to where you
17 broke down the lost profits, the next slide.

18 A. This here?

19 Q. Right there. I would like you to go through year by year.
20 This was for the compound patents. What did you specifically
21 calculate with respect to 2014 as to the lost profits?

22 A. So as shown in the charts before, I concluded that
23 Syngenta lost \$20 million in 2014.

24 Q. What did you specifically calculate with respect to
25 Syngenta's lost profits in 2015?

1 A. I concluded that Syngenta lost an additional
2 \$24.9 million.

3 Q. What did you specifically calculate with respect to
4 Syngenta's lost profits in 2016?

5 A. I calculated that Syngenta lost \$15.4 million in --
6 additional in 2016.

7 Q. Can you tell us what you specifically calculated for
8 Syngenta's lost profits in 2017?

9 A. In 2017, there was an additional \$15.3 million in losses.

10 Q. What was the sum of this, Dr. Wilner?

11 A. If you sum up all of those numbers, you get \$75.6 million.

12 Q. You said this was your opinion with respect to the
13 compound patents?

14 A. Correct.

15 Q. And let's go forward, just so that we're all clear on the
16 record, one more slide. Can you tell us what your opinion was
17 with respect to the '138 and '761 patents?

18 A. So it's that I just listed out numbers for each year for
19 2014 through 2017. Those numbers would remain the same for
20 those years, but there would be additional damages in the later
21 years. Actually, no. Actually, I apologize. Those numbers
22 would go up because there was long -- especially, like, for
23 2017, et cetera.

24 Q. You've gone through your --

25 A. 2015. Sorry.

1 Q. You've gone through the calculations that you've done. I
2 would like to talk about anything further that you did. Have
3 you tried to validate your calculations?

4 A. I did. I did not just do the calculations, stop and say,
5 "Here's what the number is." I want to validate them to ensure
6 that my calculations made sense.

7 Q. How did you go about trying to validate your calculations?

8 A. So I used three different things. I did three --
9 subjected my analysis to three different tests to validate
10 their accuracy.

11 Q. What were those?

12 A. First, I said could these damages -- could these losses be
13 accounted for by other factors and I did an analysis and it
14 concluded the answer is no.

15 Q. Did you do anything else?

16 A. Yes. The second thing I did is I wanted to confirm that
17 the damage numbers I calculated were conservative.

18 Q. Finally what did you do?

19 A. Then I did three different independent analyses to
20 corroborate my damages calculations.

21 Q. What -- tell us how you tried to account for additional
22 factors.

23 A. So it's -- one of the things that I did is I asked the
24 question could these losses be caused by other competitors,
25 because there are other competitors in the market, and I

1 concluded through two different methods that the answer was no.

2 Q. What was the first method?

3 A. So first I recognized that my two benchmarks take into
4 account competition. The budgets and Dr. Wichert's team take
5 into account that there is going to be lawful branded and
6 generic competition in the post-patent world for both
7 azoxystrobin and mesotrione.

8 Q. What was the second approach that you took?

9 A. So I said, Even though I know my benchmarks, control for
10 these -- these competitors, I did an additional step of doing a
11 competitor-by-competitor analysis looking at all of the market
12 participants to determine could they have caused Syngenta's
13 losses.

14 Q. What types of competitors did you look at?

15 A. So the first thing that I did is I looked at branded
16 companies. As Dr. Whitton testified, azoxystrobin is part of
17 the strobilurin family and that other branded companies like
18 BASF, Bayer, and DuPont make similar fungicides in that family,
19 but use other chemicals.

20 Q. How did you take that into account?

21 A. So as Dr. Wichert, Mr. Cecil, and Mr. Fisher testified,
22 they found, based upon their own experience in the industry,
23 that these other branded products did not cause azoxy's
24 decline, but I didn't just stop there.

25 Q. What did you do?

1 A. So I did my own independent research looking at market
2 shares and prices of these other branded products and derived a
3 similar conclusion.

4 Q. Did you look at other types of competitors?

5 A. I did. So in addition to branded competitors, you could
6 have generic competition, and so I looked at all the generic
7 companies, in particular Cheminova and Albaugh.

8 Q. Let's talk about Albaugh. Based on your review and your
9 analysis, did you find that Albaugh had an impact on Syngenta's
10 business, azoxystrobin sales and pricing?

11 A. No. Because as was talked about and testified to
12 yesterday and this morning, Albaugh was not really a meaningful
13 competitor in the market. Syngenta could not find Albaugh's
14 products in the market and also Albaugh was primarily selling
15 seed care products.

16 Q. Why is that important?

17 A. So if you remember back to one of my slides at the
18 beginning of the presentation, which I've reprinted here at
19 bottom of the slide, is that there are four different types of
20 products that service four different markets that Syngenta
21 makes.

22 Q. And which one did you pick?

23 A. So my -- all my calculations, my \$75.6 million in losses,
24 solely relate to the crop-protection market.

25 Q. So to the extent that Albaugh had seed care products, how

1 did that impact your analysis?

2 A. So it's that any impact Albaugh might have had on
3 Syngenta's Seedcare business is not in my calculation because I
4 only looked at crop-protection products.

5 Q. Dr. Wilner, I would like to talk about Cheminova. Did you
6 take into account whether Cheminova had an impact on Syngenta's
7 azoxystrobin sales and pricing?

8 A. I did. And so as was testified before, Cheminova did sell
9 generic azoxy, but it had limited market effects. Cheminova
10 did not have corn on their label. They didn't import a lot.
11 They were -- and they were later -- they soon exited the
12 market. And so for all of these reasons, I conclude that
13 really Cheminova was -- had limited market impacts.

14 Q. Did you do any calculations with respect to Cheminova?

15 A. I did. So I agreed that Cheminova did sell some generic
16 azoxystrobin. I did a separate calculation where what I did is
17 I allocated Syngenta's losses between Cheminova and Willowood
18 based upon import records; and as you can see from this chart
19 here, by doing that I concluded in 2014 Syngenta lost
20 \$14.1 million.

21 Q. What about 2015?

22 A. In 2015, I conclude that they lost \$13.8 million.

23 Q. In 2016?

24 A. In 2016, they lost \$3.7 million.

25 Q. How about 2017?

1 A. In 2017, they lost \$2.8 million.

2 Q. And to clarify, these losses that you're calculating, it
3 was your economic opinion it was due to Willowood?

4 A. So these are the losses due to Willowood. So that if I
5 do -- allocating some of the losses to Willowood and some to
6 Syngenta, these numbers that I just read are the losses which I
7 allocated -- which were due to Willowood's actions and
8 activities.

9 Q. Now, Dr. Wilner, what was the total that you came to?

10 A. So the total that I arrived at was \$34.4 million.

11 Q. Do you believe that this is an appropriate measure of
12 Syngenta's lost profits damages?

13 A. No, I do not.

14 Q. Well, if you don't believe it's an appropriate measure,
15 why did you perform this calculation?

16 A. So what this calculation does is it assumes Cheminova is
17 bigger than it actually was, it had more market impact, so
18 that -- because the testimony showed that Cheminova really had
19 limited market impacts, I think this calculation overallocates
20 losses to Cheminova and underallocates losses to Willowood.

21 Q. What is your opinion, Dr. Wilner, with respect to the
22 appropriate level of lost profits damages that Syngenta
23 suffered?

24 A. So this creates -- this \$34 million creates an
25 unreasonable floor in my mind, but I still maintain my

1 conclusion that Syngenta lost at least \$75.6 million because of
2 Willowood's actions.

3 Q. You've talked about the analyses of looking at other
4 competitors. I would like to see -- you know, talk to you
5 about what you tried to do on top in terms of determining
6 whether your analyses were conservative. Can you explain?

7 A. Sure. So if you remember, there are four different
8 markets in which Syngenta's azoxystrobin products compete:
9 Crop protection, seed care, lawn and garden, and paper and
10 wallboard. Even though Mr. Heinze tested that Willowood
11 participated in the seed care and lawn and garden markets, I
12 conservatively excluded damages relating to Willowood's impact
13 on those two markets in my analysis.

14 Q. If you had taken into account Syngenta's lost profits with
15 respect to seed care, lawn and garden, paper and wallboard, how
16 would that have impacted your analysis?

17 A. My damages would have gone up.

18 Q. Is there anything else that you did to try to look at
19 whether your analysis was conservative?

20 A. I did. So as we talked about, I determined that there was
21 roughly \$15 million in damages in 2017, which means that there
22 likely would be losses in later years, 2018, 2019, and beyond,
23 but I conservatively excluded them.

24 Q. What about the combinations of products in terms of
25 products that Syngenta sells with respect to azoxystrobin in

1 combination with other categories of products?

2 A. So if you remember the brand ladder, and I put the brand
3 ladder up here for azoxystrobin, I'm going to talk about the
4 second wrung from the top, combination of brands. What happens
5 with these combinations is that a farmer might buy a fungicide
6 like Quilt Xcel, which has azoxystrobin in it, and combine it
7 with another chemical, an insecticide or a herbicide. In this
8 example, it shows Quilt Xcel combined with Endigo. So that
9 farmers often buy these products together and they have a
10 functional relationship because they are able to spray
11 together.

12 Q. Did you take into account or, you know, include within
13 your calculations these other products that are combined, such
14 as Endigo and herbicides or other products?

15 A. No, I did not. My damages solely focused on azoxystrobin
16 product. So to the extent that Willowood's actions caused
17 someone not to buy a product like Quilt Xcel and they bought
18 someone else's fungicide, that farmer might have bought someone
19 else's insecticide or herbicide. Syngenta would have lost
20 sales of insecticides and herbicides, but I conservatively
21 excludes those losses in insecticides and herbicides from my
22 calculations.

23 Q. Did you do anything on top to actually go in and try to
24 corroborate your calculations?

25 A. I did. So it's -- I have young kids who are taking math

1 class now and I don't know if you remember back in your math
2 book from when you were in school that there were questions
3 that you had to answer and then sometimes in the back of the
4 book they'd have answers to sample questions. So what I did is
5 I used a process similar to that. I did a bunch of
6 calculations that I've talked about, but then I checked the
7 answer key. I used additional analysis to test did my
8 calculations make sense, do they match the answer key.

9 Q. What is that answer key grounded in?

10 A. I'm sorry.

11 Q. What is the answer key grounded in?

12 A. Grounded in. So it's -- it's grounded in reality, so what
13 actually -- actually does it match economic reality.

14 Q. What did you look at in terms of corroborating your
15 calculations?

16 A. So as I walked through my calculations, my calculations
17 were solely based upon the budgets of azoxystrobin and
18 mesotrione; and as was testified to yesterday, Syngenta also
19 had what are called last plans, latest plans or LPs, which I
20 didn't include in my analysis, but contain a lot of value.

21 Q. How did the last plans or latest projections contain
22 value?

23 A. So if you remember the testimony of Mr. Cecil and
24 Mr. Fisher is that as 2014 was evolving Syngenta learned more
25 and more about Willowood's activities and planned activities,

1 and so that learning process showed up in the LP forecasts.

2 Q. And how did you -- how does that help you validate or
3 corroborate your analysis?

4 A. So it's -- what those LPs showed is that, as Syngenta
5 garnered more and more information about Willowood's activities
6 and planned activities, these revised forecasts showed lower
7 profits -- lower forecast of profits; and if you look at the
8 mid-2014 updated forecast, the last plans, they show that these
9 latest plans fully -- almost fully captured the effect of
10 Willowood's activities.

11 Q. So how does that confirm your analysis?

12 A. So it's -- the first thing is that the reduction in these
13 LPs show a 75.6 million -- roughly a \$75.6 million loss. So
14 through an independent method of looking at these LPs, this
15 confirms my calculations. It's my calculations match the
16 answer key, they match reality.

17 Q. How did that reflect Syngenta's budgetary process?

18 A. So that gave me even more comfort in Syngenta's budgeting
19 process because they were able to take the information of
20 Willowood's entrance into the market and have it properly
21 reflected within their budgets and forecasts.

22 Q. Dr. Wilner, did you do anything else to corroborate your
23 analysis?

24 A. I did. So as we talked about before, in talking about
25 patents in general, that after a patent expires, the company

1 loses exclusivity and because -- and when they lose
2 exclusivity, that profits and sales prices could decline. So
3 I -- and it's not just a one-step drop. It's a gradual drop as
4 customers get more and more comfortable with the new entrance.
5 So I went and I tested does my model show this economic
6 principle that when a company -- when the compound patents came
7 off patent do you see a decline in Syngenta's profits.

8 Q. What did you see?

9 A. And that's what I did. So it's -- what I show here is the
10 decline in Syngenta's but-for profits with these red bars. So
11 these red bars are assuming Willowood did not infringe in the
12 but-for world; and you can see that in 2015, 2016, 2017, after
13 the compound patents expired, Syngenta's profits declined. So
14 that even if Willowood had not infringed, I fully agree that
15 the additional competition from losing exclusivity would have
16 caused Syngenta's profits to decline. So this graph, again,
17 shows that my calculations match the answer key, they match
18 reality.

19 Q. When you say that the -- based on your analysis that the
20 profits went down as the patents expired, which set of patents
21 are you referring to?

22 A. These are just the compound patents.

23 Q. If Syngenta's profits were going to go down anyway in this
24 but-for world, what impact did Willowood have?

25 A. So what Willowood did is Willowood accelerated or sped up

1 that decline.

2 Q. Can you explain?

3 A. Sure. So if you look at this graph here, I have in red
4 bars Syngenta's but-for profits, what would happen without
5 Willowood's infringement. So I did the same graph and I added
6 in a yellow line. These are Syngenta's actual profits.

7 Q. Can you tell us what those reflect?

8 A. Sure. And so this is the amount that -- the yellow bars
9 show what Syngenta actually earned in each year. In
10 particular, I would like to call your attention to the
11 two -- the yellow bar and the red bar in the middle to which I
12 have arrows pointed.

13 Q. So in 2014, you're pointing to the yellow bar, which was
14 the actual profits that Syngenta had in 2014?

15 A. That is correct.

16 Q. And in 2015, you're pointing to the red bar, which is what
17 you predicted, based on your model, that Syngenta would have
18 earned without Willowood?

19 A. Yes.

20 Q. How does that corroborate your analysis?

21 A. So that if you remember back to one of the things that was
22 testified to by Mr. Cecil, Mr. Fisher, and Dr. Wichert is that
23 Syngenta -- excuse me -- that Willowood received roughly a 12-
24 to 15-month head start because of their actions and that's what
25 shows up on this graph. Willowood got into the market 12 to 15

1 months early, so therefore they had an impact on Syngenta 12 to
2 15 months early. So you can see here that the profits that
3 Syngenta should have made and the decline that should have
4 happened in 2015 actually occurred in 2014. So the decline was
5 accelerated by roughly a year, 12 to 15 months, because of
6 Willowood's actions.

7 Q. Now, Dr. Wilner, based on your analysis, have you
8 determined by a reasonable degree of economic certainty the
9 lost profits that Syngenta has suffered as a result of
10 infringement of the compound patents, the process patent, the
11 DABCO patent?

12 A. Yes. After investigating the background of the products
13 and industry, after doing the calculation, and after performing
14 my multiple validation steps, I conclude to a reasonable degree
15 of economic certainty that Syngenta's lost profits were at
16 least \$75.6 million between 2014 and 2017, of which 20 million
17 was in 2014, 24.9 million was in 2015, 15.4 was in 2016, and
18 15.3 was in 2017.

19 MR. SANTHANAM: No further questions, Your Honor.

20 THE COURT: All right. Questions for Willowood?

21 MR. NEUMAN: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. NEUMAN:

24 Q. Good morning.

25 A. So all right.

1 Q. Nice to see you again.

2 A. Good to see you, sir.

3 Q. Now, if I just heard you correctly in response to one of
4 the last questions that counsel asked, you agree that in order
5 to present your case and proposed damages to the panel, you
6 need to conclude that as a matter of reasonable economic
7 certainty that the damages that you have concluded Syngenta
8 suffered, namely, the \$75 million, are more likely than not to
9 have been sustained as a result of Willowood's actions, is that
10 correct?

11 A. To a reasonable degree of economic certainty, yes, I
12 conclude that the damages that I calculated were due to
13 Willowood's actions.

14 Q. You agree that in conducting any such analysis, it's
15 important to establish causation between Defendant's alleged
16 actions and the damages suffered by Willowood -- by Syngenta,
17 correct?

18 A. It's -- yes, and causation could be put forth by mult --
19 through multiple methods.

20 Q. Yes. And if we turn to Slide 20 in your demonstrative.

21 THE COURT: Do you all have it on your screen?

22 MR. NEUMAN: Bonnie, can you bring up Slide 20 on the
23 demonstrative. Slide 20, please.

24 BY MR. NEUMAN:

25 Q. Now, in the first bullet in that demonstrative, you say,

1 "Calculating but-for profits requires complex economic
2 modeling." Right?

3 A. I do.

4 Q. And you've created here a complex economic model, have you
5 not?

6 A. It is model. There are multiple steps in it. Different
7 people have different views about what "complex" is.

8 Q. Well, you say that calculating but-for profits requires
9 complex economic modeling. So did you do what you say is
10 required or not?

11 A. Again, yes, the model in this case had some complexities
12 because I utilized two benchmarks.

13 Q. Do you or do you not view your model as a complex economic
14 model?

15 A. There were multiple steps in it, yes.

16 Q. Do you or do you not view your model as a complex economic
17 model, the type required to support a but-for profits analysis?

18 A. I believe what I did is complex enough to calculate
19 but-for profits, yes.

20 Q. Do you believe that it is always necessary in calculating
21 but-for profits to create a complex economic model?

22 A. Again, I went and I said "complex" because it is beyond
23 kind of a lay calculation.

24 Q. Could you answer my question, please, Dr. Wilner.

25 A. Well, it's -- one of the things I want do is I just want

1 to make sure that we're on the same page defining what the word
2 "complex" is.

3 Q. Well, as you use it in that demonstrative.

4 A. Right. And so what I'm saying is that -- what I'm trying
5 to show in this demonstrative is that it is complex beyond the
6 general knowledge of laypeople; but to someone who's an
7 economist, the calculation might not be complex.

8 Q. Now, I take it that you would agree with me that a lost
9 profits analysis must calculate what we call the but-for
10 profits, is that right?

11 A. Using this methodology, yes.

12 Q. And that essentially means the profits that you believe
13 Syngenta would have suffered in the absence of or but-for
14 Willowood's alleged infringement, correct?

15 A. I'm sorry. Can you repeat the question? I think you have
16 a wrong word in there.

17 Q. If I understand correctly, the but-for analysis means that
18 you need to calculate the damages that Syngenta would have
19 suffered in the absence -- or the profits that Syngenta would
20 have made in the absence of Willowood's alleged infringement,
21 correct?

22 A. I'm sorry. You had multiple words. You stopped and
23 started. Could you repeat it again, because I think you're
24 missing something.

25 Q. What do you think I'm missing, sir?

1 A. So it's -- if you remember what I -- there's two -- three
2 terminologies that I used in my formula. You have lost profits
3 equals but-for profits minus actual profits; and lost profits,
4 this is the amount of damages that Syngenta suffered. That's
5 the losses that they suffered. The but-for is what Syngenta
6 would have earned but for or without Willowood's infringement.

7 Q. All right. Thank you. And in order to determine the lost
8 profits, one of the steps in that is you must determine the
9 but-for profits or the profits that would have been earned
10 absent the infringement, correct?

11 A. Using this methodology, yes.

12 Q. And, generally, as I understand it, lost profits are
13 comprised of two components, lost sales and what you refer to
14 as price erosion, correct?

15 A. Those are two potential elements, in general, in
16 calculating lost profits, yes.

17 Q. And I believe you testified on direct that, in your
18 opinion, Syngenta has suffered both lost sales and price
19 erosion as a result of Willowood's infringing activities,
20 correct?

21 A. I did.

22 Q. And of the \$75 million in lost profits that Syngenta
23 suffered as a result of Willowood's action, how much of that
24 was due to lost sales?

25 A. I did not disaggregate between the two.

1 Q. Your complex model -- you don't know from your complex
2 model how much of that \$75 million is lost sales and how much
3 is price erosion, correct?

4 A. That disaggregation was irrelevant, so I don't know.

5 Q. And about how many products containing azoxystrobin did
6 Syngenta sell in 2014?

7 A. I don't recall the exact number. If you want, I can look
8 through the gross-to-net reports and count.

9 Q. Of the number of products that it sold, and not counting
10 the combination products that you say you disregarded in your
11 analysis --

12 A. Well, I didn't disregard the combination products. I
13 disregarded part of the combination products.

14 Q. Of the products that you consider in your analysis, how
15 much profits did Syngenta lose on the sale of each of those
16 products in 2014 due to Willowood's alleged infringement?

17 A. I did not disaggregate between the various azoxystrobin
18 products.

19 Q. So you don't know how much lost profits Syngenta suffered
20 with respect to each of its products on account of Willowood,
21 correct?

22 A. Because it was irrelevant to my calculations, I did not,
23 and --

24 Q. And it would also be true --

25 THE COURT: Let him finish his answer before you

1 start asking the next question.

2 MR. NEUMAN: I beg your pardon.

3 THE WITNESS: Because it was irrelevant to my
4 analysis, I did not do such calculations.

5 BY MR. NEUMAN:

6 Q. And that would be true of 2015, 2016, and 2017 as well,
7 correct?

8 A. That's correct.

9 Q. Now, according to your model, Syngenta lost \$20 million in
10 profits on account of Willowood's infringement of the compound
11 patents. Just in the year 2014 --

12 A. Correct.

13 Q. -- correct?

14 A. At least that amount. When you get into -- it's the
15 process and the DABCO patent, but for the compound patent, yes,
16 20 million.

17 Q. And you attribute those damages, as I understand it, to
18 what you describe as Willowood's early entry into the market,
19 is that right?

20 A. Yes.

21 Q. And that earlier entry into the market, you say, was made
22 possible by virtue of the fact that Willowood imported
23 5 kilograms of infringing material into the United States in
24 2013 for purposes of formulation and testing, is that right?

25 A. Along with other steps, yes.

1 Q. And so in a but-for analysis, in order for Syngenta to
2 have suffered any damages on account of Willowood's infringing
3 in that respect, you have to assume that Willowood could not
4 have entered the market in July 2014 without importing that
5 5 kilograms, correct?

6 A. I did not have to make such an assumption.

7 Q. Had Willowood been able to enter the market in 2014
8 without importing the 5 kilograms in 2013, in the but-for world
9 there would be -- in a but-for analysis, there would be no lost
10 profits, correct?

11 A. I'm sorry. Could you repeat the question?

12 Q. Yes. Had Willowood been able to enter the market in July
13 2014 without importing the 5 kilograms into the United States
14 before the patents expired, there would be no damages in a
15 but-for analysis, would there?

16 A. If they did not have the importation plus the other steps,
17 yes, I agree that -- and they could have done your
18 hypothetical, I agree.

19 Q. And the other steps being the testing and the formulation,
20 is that correct?

21 A. It's testing, formulation. I think there was some offers
22 for sale.

23 Q. Now, did you investigate whether there were any
24 laboratories available overseas that Willowood could have used
25 in 2013 to carry out its formulation and development work?

1 A. I do know that there are labs overseas, yes.

2 Q. So -- withdrawn.

3 A. But whether they were available, I don't know.

4 Q. Let's talk about -- a little bit about the sales landscape
5 in 2014. Now, Syngenta sales of azoxystrobin had declined from
6 2012 to 2013 before Willowood ever entered the market, isn't
7 that right?

8 A. And as I talked about, that decline was due to the 2012
9 drought effect, yes.

10 Q. Am I correct that they declined?

11 A. Yes, they declined.

12 Q. And, in fact, total acres treated with Syngenta fungicides
13 in the US had declined as well from 2012 to '13, correct?

14 A. I believe that's correct, yes.

15 Q. And the --

16 A. Actually, it's -- if I can check one second?

17 Q. Sure.

18 A. Yes, there was a decline between 2012 and 2013.

19 Q. And the first generic competition for azoxy products came
20 in 2014, correct?

21 A. The first --

22 Q. Generic competition for azoxystrobin products occurred in
23 2014, correct?

24 A. The first generics that were offered for sale were in
25 2014, yes.

1 Q. And, in fact, Syngenta was expecting generic competition
2 in 2014, was it not?

3 A. There were some documents which used that date as an
4 outside chance possibility, yes.

5 Q. Didn't you conclude -- you prepared an expert report in
6 this case, did you not?

7 A. I did.

8 Q. At that time you had reached the conclusions you've
9 expressed here today, correct?

10 A. Correct.

11 Q. And that report was completed last summer, correct?

12 A. The report was finished October 19th, 2016.

13 Q. Pardon?

14 A. The report was completed on October 19th, 2016.

15 Q. And you were deposed last year, September of 2016 --

16 A. Yes.

17 Q. -- on that report, correct?

18 A. Yes.

19 MR. NEUMAN: Your Honor, may I approach the witness?

20 THE COURT: All right.

21 BY MR. NEUMAN:

22 Q. Dr. Wilner, you've been handed a copy of your entire
23 deposition transcript from last year. Now, you recall, of
24 course, when you were deposed, that was in Chicago at
25 Syngenta's counsel's offices, correct?

1 A. Correct.

2 Q. And you were represented by Syngenta's counsel at that
3 deposition, and both I and Syngenta's counsel were present,
4 correct?

5 A. I don't know if technically I was represented by
6 Syngenta's counsel.

7 Q. Fair enough. Syngenta's counsel was there?

8 A. They were there, yes.

9 Q. And you recall you were under oath -- placed under oath?

10 A. Yes.

11 Q. And you told the truth at that deposition?

12 A. I did.

13 Q. All right. Could you please turn to page 138 of your
14 deposition transcript?

15 A. I'm sorry, 138?

16 Q. 138.

17 A. Yes. Could you please -- did I not ask you the following
18 question and you provided the following answer: "Question:
19 Well, by March of 2014, Syngenta was anticipating a number
20 of -- withdrawn.

21 THE COURT: I'm sorry, I couldn't hear you.

22 MR. NEUMAN: Withdrawn.

23 THE COURT: Okay.

24 BY MR. NEUMAN:

25 Q. Cheminova was the first generic azoxy entrant into the

1 market in 2014, was it not?

2 A. I believe they had the first sale, yes.

3 Q. And Willowood came into the market a little later, but in
4 the second half of 2014, correct?

5 A. Close in timeframe, yes.

6 Q. And Willowood's first sales were in July of 2014, correct?

7 A. Willowood's first commercial sales of end-use products
8 were in July of 2014, yes.

9 Q. And in July of 2014, Willowood only sold its straight
10 azoxy product, this Azoxy 2SC, correct?

11 A. That is my understanding yes.

12 Q. There were no sales of AzoxyProp Xtra, the combination
13 product, until December of 2014, correct?

14 A. I do not recall the exact date, but that sounds
15 reasonable.

16 Q. And do you recall what Willowood's share of the market was
17 in 2014?

18 THE COURT: Which market are you talking about?

19 BY MR. NEUMAN:

20 Q. Of the azoxystrobin market?

21 A. I don't recall.

22 Q. You recall it was single digits, don't you?

23 A. Sounds about right, yes.

24 Q. Okay. Did you look that in preparing your report?

25 A. I did.

1 Q. Did investigate that issue?

2 A. I did.

3 Q. Does 4.3 percent sound about right?

4 A. Sounds in the ballpark, but I can't say for certain.

5 Q. And what was the total percent of sales by Albaugh and

6 Cheminova in 2014?

7 A. I don't recall that number.

8 Q. Would 3 percent sound about right to you?

9 A. I don't know.

10 Q. And for 2014 and 2015, Syngenta's share of azoxystrobin

11 market was greater than 50 percent, was it not?

12 A. As is standard with a product on patent, yes.

13 Q. Okay. So, in fact, Syngenta's share of the market was at

14 least ten times as much as Willowood's share of the

15 azoxystrobin market in 2014 and 2015, was it not?

16 A. Doing the math, yes, that basic math, yes.

17 Q. I need to do basic math, sir.

18 A. Well, as you said, there's different complexity.

19 Q. You're right. And there are, in fact, two peek sales

20 seasons for azoxystrobin, are there not?

21 A. Yes.

22 Q. And, in fact, Willowood entirely missed the spring peek

23 sales season, did not?

24 A. No, I think Mr. Heinze testified that he got in at the

25 tail end of 2014 season.

1 Q. Right, but there's a spring sales season, and I'm asking
2 you if Willowood did not entirely miss the spring sales season?

3 A. They missed the spring sales season in 2014.

4 Q. And even though there were these generics in the market,
5 in -- by mid 2014, Syngenta did not lower its prices on
6 azoxystrobin at all in 2014, isn't that right?

7 A. No, there was some price decline.

8 Q. Do you have a copy of your expert report, or do you need
9 it?

10 A. I have it.

11 Q. Okay. This is -- I'm referring to what was marked as
12 Defendant's Exhibit 48 for identification. And, Dr. Wilner, if
13 you could please turn to page 14 of that report. Do you have
14 that in front of you?

15 A. Yes.

16 Q. Could you please look at the last sentence of the first
17 paragraph?

18 A. Yes, I see that.

19 Q. Does it say, "As a result, Syngenta maintained its 2013
20 prices in 2014. AGRI-TRAC data demonstrates the consistency of
21 Syngenta's fungicides sales per acre in 2013 --

22 THE COURT: Slow down. I can't hear you.

23 MR. NEUMAN: I beg your pardon.

24 BY MR. NEUMAN:

25 Q. "AGRI-TRAC data demonstrates the consistency of Syngenta's

1 fungicide sales per acre in 2013 and 2014. Prices were \$14.14
2 per acre in 2013 and \$14.11 per acre in 2014." Is that
3 correct?

4 A. I do see that. So as you can see that I showed the
5 decline from 2013 to 2014 in this last line.

6 Q. Of 3 cents per acre?

7 A. Right. I said it was a small decline.

8 Q. Wouldn't you regard that as holding relatively steady?

9 A. It's -- it's a -- you can look at it both ways.

10 Q. And, in fact, Syngenta raised its azoxystrobin price in
11 the fall of 2014, isn't that right?

12 A. It is my understanding, from the previous testimony, that
13 they raised their list price at that time frame, not the net
14 price, not necessarily the net price.

15 Q. Well, can you -- withdrawn.

16 So in 2014, Willowood missed the spring selling
17 season, one of the peak selling seasons, right?

18 A. Yes.

19 Q. It sold no AzoxyProp Xtra until the fall of 2014, correct?

20 MR. SANTHANAM: Objection, foundation.

21 THE WITNESS: Actually, it's -- I'm taking that on
22 your statement because I don't recall when exactly that product
23 was sold.

24 BY MR. NEUMAN:

25 Q. Syngenta's azoxystrobin prices held pretty steady during

1 2014, correct?

2 A. Again, it's relatively stable, slight decline, however you
3 want to describe it, yes.

4 Q. Do you regard a 3 percent -- 3-cent per acre difference as
5 potentially significant for purposes of calculating damages?

6 A. It could be, it couldn't be, it depends upon the context.

7 Q. Cheminova got into the market and started selling product
8 before Willowood, correct?

9 A. Correct.

10 Q. Albaugh was in the market in 2014, correct?

11 A. It's my understanding they were not in the market for
12 crop-protection products at that time.

13 Q. And despite -- in light of all of that -- or despite all
14 of that, you say that Willowood cost Syngenta \$20 million in
15 profits in 2014 alone, correct?

16 A. I did, mostly based on the testimony from Dr. Wichert
17 earlier today.

18 Q. And that neither Cheminova or Albaugh had any effect,
19 correct?

20 A. I did not say that.

21 Q. Did Cheminova have an effect on Syngenta's profits on
22 azoxystrobin sales in 2014?

23 A. I conclude that they did not have a meaningful effect, no.

24 Q. What is a meaningful effect, sir?

25 A. Again, based upon the testimony of Mr. Cecil, Mr. Fisher

1 and Dr. Wichert, in that Syngenta was primarily setting its
2 prices and the market activity was based upon Willowood's
3 activities, not Cheminova's activities.

4 Q. So let's examine your complex model. Let's start with the
5 use of budgeting, which I understand is a key building block or
6 benchmark in your calculations, is that fair?

7 A. Which budget are you talking about?

8 Q. Well, are either one of them not an important foundation
9 in your analysis?

10 A. Once again, you said your benchmarks, I just want to be
11 clear about what we're talking about.

12 Q. Okay. Will you agree that the azoxystrobin budgeting is
13 an important foundation in your analysis?

14 A. It is -- as it is an input in my model, yes.

15 Q. It's an important input, would you not agree?

16 A. Everything, including the model, is important.

17 Q. And your -- and the mesotrione budgeting is also an
18 important input into your calculations, am I correct?

19 A. Same answer, yes.

20 Q. And as I understand it, for 2014, you look at Syngenta's
21 budget for azoxystrobin sales that was created in October of --
22 or November of 2013 as the first building -- as the first
23 component, correct?

24 A. That's where I started, yes.

25 Q. And then you adjust that based on a mesotrione benchmark,

1 is that right?

2 A. It's based upon how much mesotrione either made, missed or
3 exceeded its budget, yes.

4 Q. And then after that adjustment you compare that adjusted
5 projection against actual azoxystrobin sales, correct?

6 A. You can call it adjusted projection. I call it the
7 but-for economic scenario, yes.

8 Q. And the adjustments you made using the mesotrione data
9 were based on using Syngenta's budgets of mesotrione sales
10 versus their actual sales, correct?

11 A. That is correct, for 2014.

12 Q. For 2014. Thank you. So would you agree with me that for
13 your calculations to be accurate and reliable, it's important
14 that those budgets, and the -- the budgeting that Syngenta did
15 for both azoxystrobin and mesotrione, be accurate and reliable?

16 A. Yes.

17 Q. All else being equal, to the extent that Syngenta's sales
18 forecast budgeting are not credible, accurate and reliable,
19 your analysis and conclusions would not be credible, accurate
20 or reliable, correct?

21 A. If the bases of my model have inaccuracies, yes, my model
22 would be inaccurate. That's why I spent a lot of time
23 confirming the accuracy of the bases.

24 Q. And would you agree with me that even a small percentage
25 difference in the accuracy of Syngenta's budgeting versus

1 actuals for azoxystrobin could lead to very large changes in
2 your damage calculations?

3 A. I don't know.

4 Q. You haven't examined that?

5 A. Again, I got comfort in the accuracy, but then one of the
6 things that I did not do is I did not say if budgets are off by
7 this amount, what is the effect; if budgets are off by that
8 amount -- I didn't do that calculation, because I was
9 comfortable in the accuracy of the budgets and the budgeting
10 process.

11 Q. And as I understand it, Dr. Wilner, the first thing you
12 did to get comfortable with Syngenta's budgeting process was to
13 talk to Syngenta employees about how they did their budgeting,
14 correct?

15 A. Again, I don't know if chronologically that's how it
16 worked, but that was something that I did early on.

17 Q. Well, you recall in your expert -- your report, you
18 stated, and in your deposition you stated, that everything you
19 learned about the process, and how exacting that process was,
20 came from your discussions with Syngenta employees. Do you
21 recall that?

22 A. It sounds right; but, again, if you put the quote in front
23 of me, I'll be happy to confirm, but I don't recall that exact
24 statement.

25 Q. And basically, as I understand it, you came to the

1 conclusion that Syngenta's budgeting process was an exacting
2 process, correct?

3 A. Correct.

4 Q. And you came to that conclusion based upon -- what you
5 learned about that process essentially is what we've heard from
6 Mr. Cecil, Mr. Fisher and Dr. Wichert here in this courtroom,
7 correct?

8 A. Plus the confirmatory steps that I did to insure the
9 accuracy of those -- of that testimony.

10 Q. We'll get to that. Now, when you set out to determine
11 whether or not Syngenta's budgeting process was sufficiently
12 reliable for you to use to come up with a damages figure of
13 \$75 million, did you review any written policies, procedures or
14 protocols that Syngenta might have governing how they do their
15 budgets?

16 A. I did not look at any such documents, no.

17 Q. Did you ask to see any?

18 A. I didn't think it was necessary.

19 Q. Do you know whether there are any written policies,
20 protocols or procedures that lay out the criteria by which
21 Syngenta is to formulate its budgets?

22 A. I believe that there were documents and we heard testimony
23 to that effect earlier this week.

24 Q. No. I'm talking about documents that actually set forth
25 here is what one must consider in setting a budget for a

1 particular product, here's what weight to give it, or here's a
2 formula for coming up with the budget. Anything of that sort?

3 A. I think the testimony was that it is not a formulaic
4 process, that what the people do is they utilize their years of
5 experience and adjust on a product-by-product basis, a
6 market-by-market basis but using overall consistent
7 assumptions.

8 Q. What are those assumptions?

9 A. Well, I think there was testimony about making assumptions
10 about what crop prices were going to do, about acreage, about
11 the allocation of that acreage between corn, wheat, soybeans,
12 et cetera, competition. There was lots of factors that have
13 been talked about over the last couple of days.

14 Q. Before you prepared your expert report and formed your
15 opinions last year, did you sit down and determine and make a
16 list of exactly what factors Syngenta must consider or
17 typically considers in formulating its budgets?

18 A. I did not create such a list, no.

19 Q. Have you ever seen any document, or heard any discussion,
20 either in preparing your report last year or sitting in this
21 courtroom the last several days, setting out any particular
22 formula or mathematical quantitative criteria for how those
23 factors are to be considered in the formulation of Syngenta's
24 budgets.

25 A. Dr. Wichert talked about the post-patent pillars, the five

1 pillars that hold up the strategy, but there was no
2 quantitative analysis or formula that I saw in combination with
3 that.

4 MR. NEUMAN: Your Honor, this might be a good place
5 to break.

6 THE COURT: A good time? All right. Ladies and
7 gentlemen, I'm going to excuse you for lunch. You'll remember
8 that we're going to compress our lunch hour a little bit to
9 account for leaving a little early. So it's 12:30, I'll ask
10 you to come back at 1:30. Keep an open mind, don't talk about
11 the case, have no contact with anyone and no independent
12 investigation, and leave your notes in your chair. I'll see
13 you in an hour at 1:30.

14 (At 12:31 p.m., jury leaves.)

15 THE COURT: All right. Anything that we need to take
16 up before we break for lunch?

17 MR. LEVINE: No.

18 THE COURT: No? All right. I'll see you all at
19 1:30.

20 (At 12:31 p.m., break taken.)

21 (At 1:30 p.m., break concluded.)

22 THE COURT: Good afternoon. Anything we need to take
23 up before the jury comes in? No?

24 MR. SANTHANAM: No, Your Honor.

25 THE COURT: All right. You can bring the jury in.

1 I'll tell you, this jury has been very prompt. We have not had
2 to wait on them at all, and that is not always the case.

3 (At 1:33 p.m., jury arrives.)

4 THE COURT: Good afternoon. I believe we are ready
5 to continue with examination so, Mr. Neuman, you may proceed.

6 MR. NEUMAN: Thank you, Your Honor.

7 BY MR. NEUMAN:

8 Q. Good afternoon, Dr. Wilner.

9 A. Good afternoon.

10 Q. Now, you acknowledge, do you not, that an exacting budget
11 process does not necessarily yield exactly accurate and
12 reliable particular -- and predictable results, do you not?

13 A. It might or might not.

14 Q. Did you attempt in this case to replicate any of the
15 budget forecast, the annual budget forecast, that Syngenta came
16 up with, that is actually replicate the process and the
17 criteria by which they came up with their budgets for any
18 particular year?

19 A. I did not.

20 Q. So did you attempt, for example, to deconstruct exactly
21 how they came up with a particular number for a particular year
22 and then reproduce that number?

23 A. No, I did not.

24 Q. You are an economist, correct?

25 A. I am.

1 Q. And you spend a lot of time doing statistical analyses, do
2 you not?

3 A. I spend a fair bit of time, yes.

4 Q. And you didn't think to try to do that in this case?

5 A. I didn't think it was necessary, no.

6 Q. Now, in response to questions by Syngenta's counsel, you
7 indicated that the Syngenta budgets for the years 2009 through
8 2013 were not actually what you used as the benchmark, correct?

9 A. Correct. I utilized benchmarks for 2014 to 2017.

10 Q. But you had budget results for years 2009 to 2013 as well,
11 correct?

12 A. I had that information, yes.

13 Q. And you looked at those budgets, right?

14 A. I did.

15 Q. And, in fact, Syngenta has been selling azoxytrione [sic]
16 since before the turn of the last century, correct?

17 A. I'm sorry, what product?

18 THE COURT: Did you combine your products?

19 MR. NEUMAN: I'm trying to cut through things.

20 THE COURT: That's all right. Go ahead.

21 BY MR. NEUMAN:

22 Q. In fact, Syngenta has been selling azoxystrobin since
23 before 2000, correct?

24 A. Yes. I think that's what the testimony was.

25 Q. And you heard the testimony from Syngenta's witnesses that

1 they've been doing budgeting, annual budgeting, for
2 azoxystrobin since they began selling azoxystrobin products,
3 right?

4 A. Yes.

5 Q. Did you look at any of those budgets from years prior to
6 2009?

7 A. I did not.

8 Q. Did you ask to look at them?

9 A. I didn't think it was necessary, so I didn't ask for them.

10 Q. As an economist attempting to insure that their budgeting
11 process yielded sufficiently accurate results, wouldn't you
12 want to look at how those forecasts performed against actual
13 results over as many years as possible?

14 A. Not necessarily. I got sufficient number of years, which
15 were corroborated by the conversations that I had.

16 Q. And they were all wrong, isn't that right?

17 A. There were deviations that I testified to, yes, for
18 various one-time reasons.

19 Q. And you've managed to find a various one-time reason to
20 explain the substantial variations for every year from 2009 to
21 2013, right?

22 A. No. It's -- 2012 was pretty accurate.

23 Q. 2009 -- and 2013 was pretty inaccurate, wasn't it?

24 A. There were some deviations, yes.

25 MR. NEUMAN: Could we put up Defendant's 252, please.

1 BY MR. NEUMAN:

2 Q. So based on results for each year from 2009 through the
3 time you looked at these budgets, you didn't think, as an
4 economist who likes to have as much data as would be useful,
5 maybe you should look back historically and see how things were
6 going before the great recession started?

7 A. No, because the economy was very different, just
8 generally, before the great recession, so it's -- I felt that
9 after the great recession, and the other factors that we talked
10 about during the relevant time frame, that was the most
11 important data to look at.

12 Q. Well, exactly what did Syngenta consider? What criteria
13 did Syngenta consider in doing its 2009 budget?

14 A. I don't know specifically about the 2009 time frame. I
15 believe Syngenta's witnesses have talked about various factors
16 that they take into account when they create budgets generally.

17 Q. Right. I'm asking --

18 A. Whether those factors exist in 2009, I don't know.

19 Q. Right. But I'm asking you, as the expert who is
20 sponsoring a \$75 million damage calculation, based on
21 Syngenta's budgeting, whether you can tell us what specific
22 factors Syngenta considered and how they considered them in
23 preparing the 2009 budget?

24 A. I do not know the formulating process that they utilized
25 to generate the 2009 numbers.

1 Q. And that's true for 2010 as well?

2 A. Correct.

3 Q. And 2011?

4 A. Correct. I don't know the formulated process.

5 Q. 2012?

6 A. Correct.

7 Q. And 2013?

8 A. Yes.

9 Q. And for that matter, 2014?

10 A. Yes.

11 Q. Okay. But, somehow, you've managed to conclude that for

12 2009 to 2011, every dollar in deviation between the budget and

13 the actuals for each of those years was due to the Great

14 Recession?

15 A. No.

16 Q. What else is it due to?

17 A. Well, it's -- one of things that you can see, for example,

18 if you look at 2015, 2015, I would say that the budgets versus

19 actuals are very close, but they're not to the dollar.

20 Q. Right. But I asked you about 2009 to 2011. In shrugging

21 off the variations in those budgets earlier, you said, well,

22 a-ha, I found the reason for that, and it's the Great

23 Recession. Are you telling the jury that you have concluded

24 that every dollar in the deviations for 2009 to 2011 you have

25 determined to be attributable to the Great Recession?

1 A. Well, first, I don't know if I -- you could say I shrugged
2 it off. What I did is I said that it is very likely that the
3 majority of -- actually, that most, if not all, of that
4 deviation is due to the Great Recession.

5 It's very unlikely and I will admit that forecasting
6 is almost never going to be to the dollar, to the penny, but it
7 can be close enough. And, for example, you can see that it was
8 not to the dollar, to the penny in 2015, but the deviation was
9 relatively small.

10 Q. Did you do any statistical analysis or inquiries, any
11 regression analyses to try to determine exactly what accounted
12 for the disparities between Syngenta's budgets and actuals for
13 the years 2009 to 2011?

14 A. I did not perform any such regressions.

15 Q. Do you think it might be useful to do that as an economist
16 attempting to determine why Syngenta's budgets were so off in
17 those years?

18 A. I don't think it was necessary, no.

19 Q. By the way, when did the Great Recession end?

20 A. Well, it varied depending upon the sector of the economy.
21 Different sectors had different time frames than others.

22 Q. Was it over by 2013?

23 A. For certain sectors, yes; for certain sectors, maybe not.

24 Q. And then you also indicated that you read Dr. Romer of UC
25 Berkeley --

1 A. I did.

2 Q. -- who provided you with the reason why Syngenta's budgets
3 were off in which year?

4 A. Again, she was one of the sources, and she talked about
5 the problems of the forecasting during the time frame. I don't
6 recall the exact years.

7 Q. Did you do any statistical analysis, any regression
8 analysis to try to confirm whether Dr. Romer's reasons
9 accounted for all the disparities, in whatever years it was
10 that you now can't remember, you relied on her for?

11 A. I did statistical analyses based upon my work as an
12 economist in the crop insurance industry, looking at crop
13 insurance prices, but I did not do a confirmation of the
14 methodology that Dr. Romer utilized.

15 Q. And then, in 2013, you decided that that disparity between
16 the actuals and the budget was due to the drought?

17 A. I didn't decide that; that's what the facts told me.

18 Q. And did the -- how much of that disparity did the facts
19 tell you -- how much of that disparity did the facts tell you
20 were attributable to the drought?

21 A. Again, I did not do such a disaggregation. However, based
22 upon the analysis that I performed, I concluded that most of
23 that deviation was due to the prior year drought.

24 Q. Now, when you set out to perform your analysis in this
25 case and decided to use this benchmark approach, did you have

1 in mind any particular criteria in terms of the threshold at
2 which budget -- variances between budgets and actuals would
3 indicate that a budget -- that the use of that benchmark was
4 not sufficiently reliable?

5 A. So it's -- first thing is, when I approach this problem,
6 there are multiple methods that I utilize. After doing
7 particular analyses, I decided the Benchmark Method was the
8 most appropriate after I found out certain facts. But I did
9 not do any analysis to say, hey, look, if budget deviations are
10 more than X, it's unreliable.

11 Q. Are there any criteria in the profession that would have
12 guided you in that regard when you set out to do this analysis?

13 A. I think that the only thing that is necessary from various
14 treatises that I have read and I have on my bookshelf is that
15 it needs to be sufficiently similar, but it doesn't define what
16 "sufficiently similar" is.

17 Q. What is "sufficiently similar" in your mind? What
18 criteria did you use?

19 A. Just like Syngenta's budgeting process, it varies from
20 situation to situation.

21 Q. And you think that the variations depicted on Defendant's
22 252 are within the range of variation that you would regard as
23 acceptable to perform a damages analysis that leads to a
24 calculation of at least \$75 million in damages, is that right?

25 A. I do, because, for example, if you look at 2015, when

1 Syngenta knew what was going on, the variation was less than
2 1 percent. That's pretty good.

3 Q. That was one year, it was pretty good, right?

4 A. Yeah. But if you look at, for example, 2012, another
5 year, the variation was, what, maybe 2 percent, 4 percent,
6 something like that.

7 Q. How much was it off in 2013 -- '12, rather? I beg your
8 pardon.

9 THE COURT: In what?

10 BY MR. NEUMAN:

11 Q. In the year you just mentioned, which is 2012, how much
12 were sales off from budget?

13 A. In 2012?

14 Q. Yes.

15 A. 2012, it was off by 14 million, which is, what, maybe
16 6 percent, something like that.

17 Q. My question was, though --

18 A. Sorry.

19 Q. -- when you -- not before you set out to do your analysis,
20 but when you did your analysis, did you have any numerical
21 criteria in mind in terms of what an acceptable percentage
22 variation would be that would be -- that would allow you to use
23 a method that resulted in a \$75 million damage claim?

24 A. I did not have a numerical criteria. I just had the
25 criteria that I talked about from the texts.

1 Q. Now, as I understand your testimony, you used the
2 October-November 2014 budget because it's your opinion that it
3 was at that time -- that it was after that that Syngenta
4 obtained sufficient information about Willowood to adjust its
5 budgets, is that right?

6 A. I believe that was what -- the testimony from Mr. Cecil,
7 for example.

8 Q. So you rely on Mr. Cecil for that, correct?

9 A. It's amongst other things, yes.

10 Q. Now, can you tell me, please, what exactly Syngenta
11 learned after it prepared the fall 2014 budget and the first LP
12 revision in January of 2014?

13 A. Sure. So it's -- first, there was market intelligence
14 from various sources. Secondly, in early January 2014,
15 Syngenta had a press -- I'm sorry, Willowood had a press
16 release announcing that they were coming to market.

17 Furthermore, I believe when Mr. Heinze was
18 testifying, he testified about a letter that Mr. Levine, one of
19 Syngenta's attorneys, sent to Willowood asking about more
20 information about what Willowood's activities were, and
21 Mr. Heinze respond. So those are just three examples that I
22 can think of off the top of my head.

23 Q. I'd like to know what specific market intelligence you
24 rely on to determine that you should not have used one of the
25 later LPs in your damages analysis.

1 A. So if you want something specific, I'll talk about -- I
2 think it was January 9th, 2014, press release. I might have
3 the date wrong, but it was somewhere in that range.

4 Q. Isn't it true that Cheminova had also issued a press
5 release announcing its intent to get into the market in 2014?

6 A. I don't recall.

7 Q. Did you look at that issue?

8 A. I might have, but I don't recall.

9 Q. Okay. So how much -- by how much did Syngenta's budget
10 decrease from the time it prepared the initial budget in the
11 fall of 2013 to the first LP in 2014?

12 A. I have that information somewhere. I don't know if it's
13 in -- if I have the January LPs here. So it's -- the January
14 LPs are here. However, unfortunately, these LPs list the
15 products by -- I'm sorry, list budgets and prices by product,
16 for instance, Abound, Quadris, Quadris Top, et cetera. I would
17 need to add them all up. If you want, I can add them up.

18 Q. Well, it's millions of dollars, right?

19 A. Most likely, yeah.

20 Q. And is it your testimony that the letter that Mr. Levine
21 wrote to Willowood and the Willowood press release and the
22 market intelligence that you just described accounted for every
23 dollar in the decrease of Syngenta's budget to the first LP in
24 January of 2014?

25 A. Well, first, again, I'm never going to say "every dollar,"

1 because budgets and forecasts are never to any dollar.
2 Secondly, Mr. Fisher testified that he got on an airplane very
3 quickly in January because the customers were panicked, and he
4 had to go and calm them down.

5 Q. But I want to know what -- how, specifically, that
6 translated to any specific dollar reduction in the budget. Do
7 you know how that was done?

8 A. Again, just like how the budgets were created, I don't
9 know the process that was quantitatively utilized to do that
10 reduction.

11 Q. And then, the LP decreased again from January to February
12 of 2014, correct?

13 A. It did.

14 Q. And do you attribute that entire decrease to additional
15 information concerning Willowood?

16 A. Again, I'm never going to say the entire thing, but, for
17 example, if you recall from Mr. Heinze's testimony, he said
18 that certain facts that Syngenta thought were true in
19 Mr. Levine's letter were not true, such as products being in
20 the warehouse in Pasco, Washington. And so, there was more
21 information garnered as a result of that and other things.

22 In addition, there were results that Mr. Fisher
23 received from his contact with the customers, which likely also
24 caused forecasts to be altered.

25 Q. In that window, from January to February 2014, what

1 conversations did Mr. Fisher have with customers that led to a
2 reduction in the LP?

3 A. I do not know specific conversations.

4 Q. You referred to Mr. Heinze's response to Mr. Levine. You
5 believe that was sent in February 2014?

6 A. I believe it was sent in late January, but I could be
7 wrong. I don't recall the exact dates.

8 Q. And in that letter, Mr. Heinze said: Contrary to your
9 assertion, we are not storing product in Washington State, he
10 did not?

11 A. Yes, he did.

12 Q. So how would that assertion, contradicting Syngenta's
13 prior belief that Willowood had already imported material and
14 was storing it in Washington State, how would learning that
15 that wasn't true cause a further concern about Willowood's
16 activity and a decrease in the LP?

17 A. What I believe that it shows is that Syngenta did not have
18 full information about Willowood's activities and planned
19 activities in -- at that time. And so, as 2014 evolved,
20 they've garnered more information and overcame some of -- and
21 learned more about what those activities and planned activities
22 were.

23 Q. And then, from February to March 2015, what exactly -- the
24 budget -- the LP further decreased in the next month, from
25 February to March --

1 A. I believe it did, yes.

2 Q. -- correct?

3 A. Yes.

4 Q. What, exactly, did Syngenta learn about Willowood's
5 activities in that month that it had not previously known that
6 led it to decrease its LP?

7 A. I do not have -- know the specific information that they
8 learned.

9 Q. And then, the LP decreased again from March to April,
10 correct?

11 A. Correct.

12 Q. What specific information about Willowood, if anything,
13 did Syngenta obtain that led -- that would have led it to
14 decrease its budget -- its LP?

15 A. I don't -- I don't have that specific information.

16 Q. And the same answer would apply with respect to the
17 decreases in the LPs from April to May and May to June?

18 A. Actually, it's -- I think there was an increase from May
19 to June.

20 Q. Was that attributable to anything that they learned about
21 Willowood?

22 A. I don't know.

23 Q. Now, for you to derive your \$75 million figure, it would
24 also be important that Syngenta's mesotrione budgeting process
25 yielded accurate results, isn't that correct?

1 A. Yes.

2 Q. How many years of Syngenta budget forecasting for
3 mesotrione did you look at?

4 A. So it's -- I utilized the 2014, 2015, 2016 forecasts in --
5 and budgets in my calculations.

6 Q. And mesotrione had been on the market for many years prior
7 to that time, right?

8 A. It had.

9 Q. And Syngenta prepared annual budgets going back to when it
10 first started -- for mesotrione going back to when it first
11 started selling that product, correct?

12 A. Correct.

13 Q. And you didn't think to look at those earlier year budgets
14 to determine the accuracy of its forecasting for mesotrione?

15 A. I didn't think it was necessary to do my analysis, no.

16 Q. Now, you say on -- if we could bring up demonstrative
17 slide 23, Bonnie. Thank you.

18 So here, you're talking about the azoxy budget
19 benchmarks. And the first bullet under the -- the third bullet
20 down, I'm sorry, "Azoxy Budget Benchmark," and then the
21 first -- you can leave it there. Thank you. You say that the
22 azoxy budget benchmark isolates the impact of Willowood's
23 infringement?

24 A. I do.

25 Q. And by that, you're referring to the fact that, again, by

1 November of 2014, you think that Syngenta -- after that time,
2 Syngenta learned about Willowood?

3 A. Got sufficient information about it, yes.

4 Q. In 2014 -- 2013, 2014?

5 A. At the end of 2013, beginning of 2014.

6 Q. So when you say the benchmark isolates the impact of
7 Willowood's infringement, is it your testimony that that --
8 that the difference between that benchmark -- that that budget
9 in the fall of 2013 and all the decreases later are
10 attributable to Willowood?

11 A. No. As I think I showed in my chart, that I attributed
12 less than half of the 2014 shortfall to Willowood.

13 Q. That 2014 budget that was prepared in the fall of 2014,
14 would only isolate the impact of Willowood's infringement if
15 Syngenta's budget process was 100 percent accurate, isn't that
16 right?

17 A. First, I think you said -- I think you had a missed year
18 in there somewhere.

19 Q. The budget for 2014 that Syngenta prepared in the fall of
20 2013 would only isolate the impact of Willowood's infringement
21 if Syngenta's budgeting process were 100 percent accurate,
22 isn't that right?

23 A. No. I'm saying that, again, it isolates it to a
24 reasonable degree of economic certainty. And, again, you keep
25 asking me questions about to the dollar, and I can't say

1 forecasting is to the dollar.

2 Q. Let's go to Slide 24.

3 Now, you say in that second bullet -- dark bullet
4 down at the bottom, "Mesotrione benchmark accounts for the
5 following." You say it accounts -- it isolates the impact of
6 Willowood's infringement. Do you see that?

7 A. I do.

8 Q. So how does that -- if the azoxystrobin budget isolates
9 the impact of Willowood's infringement, what's the mesotrione
10 benchmark also isolating the impact of Willowood's
11 infringement?

12 A. One of the things that we heard testimony about from
13 Dr. Wichert earlier today is that there was not any early-entry
14 infringement with mesotrione like there was with azoxystrobin.
15 So that what happened with the mesotrione, it -- those budgets
16 and actual profits were not affected by any company doing any
17 early-entry infringement.

18 Q. And you say then that the mesotrione budget accounts for
19 economic market factors affecting the agriculture industry?

20 A. They do.

21 Q. Do those economic market factors that you say are
22 accounted for in the mesotrione budgeting process affect
23 fungicides and herbicides exactly the same?

24 A. Again, not exactly the same, probably not.

25 Q. So you would agree with me, wouldn't you, that the

1 mesotrione benchmark accounts for economic market factors that
2 are relevant to azoxystrobin only to the extent that those
3 factors affect azoxystrobin and mesotrione sales exactly the
4 same, isn't that right?

5 A. Again, I'm having trouble with "exact." They control
6 things to -- in a sufficient way, in a sufficiently comparable
7 manner.

8 Q. Now, let's take a look -- take a little deeper dive at
9 your method of calculation.

10 As I understand it, after your mesotrione adjustment
11 was made for 2014, you calculated a percentage variation for
12 2014 that you thought should apply based on mesotrione, and you
13 calculated your damages number for 2014, and then you adjusted
14 Syngenta's 2015 budget by that difference that you determined
15 should have been budgeted by Syngenta, correct?

16 A. So, first, I don't think it was a mesotrione budget --
17 percentage calculation. It was a combination of calculations
18 resulting from the lost profits, but I went and knew that the
19 budgets for 2015 had been reduced and so that was, I believe, a
20 sufficient benchmark to determine what the budgets would have
21 been had Willowood not done its early entry.

22 Q. So if we turn to Slide 35 in the demonstratives, please,
23 here we see that for 2015, you adjusted what was Syngenta's
24 final budget for 2015 of \$99 million by the additional budget
25 using mesotrione to conclude that Syngenta should have used the

1 \$115.4 million as the basis for its 2015 budget, correct?

2 A. Again, I increased it, but it was not based upon
3 mesotrione. It was based upon the profit differential
4 calculation I had calculated.

5 Q. Using mesotrione as the benchmark?

6 A. As one of the benchmarks, yes.

7 Q. And then using what you thought would have resulted -- or
8 should have resulted in Syngenta's budgeting process --

9 A. Correct.

10 Q. -- based on what happened the year before?

11 A. Correct.

12 Q. But that's not -- and, again, that's your number; that's
13 not the number that Syngenta used, right?

14 A. Again, this gets back to coming up with the but-for --

15 Q. First of all, am I right?

16 A. Correct. It is right because the but-for world never
17 happened.

18 Q. And let me talk about the 2016 and 2017 damages
19 calculation. Now, you say in your slide presentation that you
20 used a similar method to calculate 2016 lost profits and 2017
21 lost profits as you did for 2014 and 2015, right?

22 A. A similar process, yes.

23 Q. It's not really that similar, is it, Dr. Wilner?

24 A. I think it is.

25 Q. Dr. Wilner, you prepared your budget calculations -- I'm

1 sorry -- your damage calculations in the summer of 2016,
2 correct?

3 A. Correct.

4 Q. And for 2014 and 2015, you used budgeted numbers for those
5 years against actual sales numbers for those years, correct?

6 A. Correct.

7 Q. What's your claimed damages for the year 2016?

8 A. For 2016, as my report was written in August of 2016, so
9 at that time, I did not --

10 Q. What was your damages number for 2016?

11 A. It's -- the number, I believe, was about \$15 million for
12 2016.

13 Q. And to calculate that number in the middle of 2016, you
14 did not have actual 2016 sales figures, did you?

15 A. I had year-to-date figures. I did not have full-year
16 actual figures.

17 Q. So to calculate that \$15 million for 2016, you had to make
18 assumptions about where Syngenta's actual sales would end up,
19 and you used a midyear LP for that calculation, correct?

20 A. That is correct.

21 Q. And you also calculated, in the middle of 2016, damages
22 for the year 2017, right?

23 A. Correct.

24 Q. And you say that your damages analysis is conservative
25 because you stopped at 2017, right?

1 A. Correct.

2 Q. So let's see how we calculated the damages figure for
3 2017, Dr. Wilner.

4 In the summer of 2016, when you calculated that
5 number for 2017, Syngenta had not even prepared its final
6 budget for 2017, had it?

7 A. The final budget had not been prepared, no.

8 Q. In fact, this was six months before 2017, so Syngenta was
9 still in the middle of that early planning process for the 2017
10 budget, right?

11 A. No, I think they were towards the end of the process.

12 Q. And each month, as they go through another step in their
13 exacting budgeting process where they get people with knowledge
14 in a room to talk and hash things out, they refine those
15 budgets each month, right?

16 A. They could, yes.

17 Q. So that one would expect that the final budget prepared
18 for 2017 in the fall of 2016 would contain the result of more
19 robust internal conversations at Syngenta and more current
20 information, correct?

21 A. I use the best information available at the end
22 of -- which was through June 2016. Obviously, the more
23 information that you have as you go on later, you can be more
24 exacting.

25 Q. But to determine that Syngenta is owed \$15 million for the

1 year 2017, you started with a June 2016 forecast of 2017 sales,
2 correct?

3 A. Correct, because it was very close to the end of that
4 18-month budgeting process.

5 Q. And then, as I understand your method for 2014 and 2015,
6 you compare budgeted sales to actual annual sales, correct?

7 A. For mesotrione, yes.

8 Q. And in June or July or August of 2016, there were no data
9 for any mesotrione sales for any month in 2017, right?

10 A. Correct.

11 Q. So in order to compare budget versus actual for purposes
12 of your calculations, what did you use as actual 2017 sales?

13 A. So it's -- what I did is, as you can see from -- for
14 example, the process that you see here in 2015, the first three
15 parts of the slide in that, I determined that had Willowood not
16 infringed, the budgets for 2015 would have been different; and
17 I go and do other steps and I compare, in essence, something
18 relating to the budget to actuals.

19 What I did for 2017 is I've continued this process of
20 determining what the budget would have been in 2017 had
21 Willowood not infringed and compared it to the budget that was
22 going to be used in 2017 because that was the best information
23 that was available. That was the best forecast and the best
24 information.

25 Q. As a professional economist and statistician, sir, do you

1 always just use the best information available as good enough?
2 A. Not necessarily, but, again, because I had reviewed the
3 exacting nature of the budgeting process, I felt comfortable
4 that the budget for 2017 that was in existence in June of 2016,
5 the last time period I could gain information, was a
6 sufficiently reliable information -- was a sufficiently
7 reliable statistic about what would have happened in 2017.

8 Q. Even though we've just been discussing the fact that the
9 budget is prepared towards the end of the year for the next
10 year, change each month thereafter, sometimes by millions of
11 dollars, based on new information that comes in, right?

12 A. In other months, the LPs did not change as dramatically as
13 the time frame you are talking about because there was no -- I
14 don't want to use the word "cataclysmic," but no major change
15 like a major generic early entry like what happened in early
16 2014.

17 Q. You used mesotriione as a benchmark because you believe
18 that it is sufficiently similar to the patented products at
19 issue to be used as a benchmark to create reliable and credible
20 results, correct?

21 A. For the purpose I used it for, yes.

22 Q. And you would agree with me that to do an analysis like
23 this, one must take care to ensure that the patented product is
24 sufficiently comparable to the benchmark that you're using,
25 right?

1 A. For the purpose you're using it for, yes.

2 Q. And if the benchmark is not sufficiently similar to the
3 patented product, the benchmark analysis that you did in this
4 case for this particular purpose would not be reliable,
5 correct?

6 A. Well, but -- the thing I'm saying -- why I answer for the
7 purpose I'm using it for is that I used each benchmark -- the
8 mesotrione benchmark, the azoxystrobin budget benchmark -- in
9 different ways. So that for the way in which I used the
10 mesotrione benchmark, comparing budget to actual in this case,
11 that is why I say for the particular purpose, and if that
12 particular -- and so, again, to answer your question, if the
13 particular purpose is -- has some deviation, yes, I agree, you
14 can't use the benchmark.

15 Q. And to determine the accuracy of the mesotrione budgeting,
16 as we discussed, you look at two years of budgeting versus
17 actuals, right?

18 A. No. I said I applied, again, I think two to -- I think
19 four years of budgeting. Plus I looked at additional
20 forecasts.

21 Q. But you didn't go back to look at budgets earlier than
22 what year for mesotrione?

23 A. I don't recall the exact date, how early I went for
24 mesotrione.

25 Q. Did you consider any other benchmarks besides mesotrione?

1 A. I don't know if I considered another one for mesotrione.
2 I know I considered a different one for budgets, and if I used
3 those other benchmarks, which I don't think were as applicable,
4 but if I had used those benchmarks for azoxystrobin -- instead
5 of the azoxystrobin budget, I think my damages would have been
6 higher.

7 Q. Did the Syngenta people suggest that you use the
8 mesotrione numbers as a benchmark?

9 A. No, it was a collaborative effort, and I talked -- I
10 believe I talked to them about wanting to use a benchmark, and
11 because I was not familiar with every product that Syngenta
12 had, when I described what I wanted, they said mesotrione. So
13 I think it was a collaborative process. It wasn't that I
14 walked in and said tell me about mesotrione and it wasn't that
15 they said use mesotrione.

16 Q. And as I understand it, you think that mesotrione is
17 sufficiently similar to azoxystrobin for the purposes of your
18 analysis for three basic reasons. One, both products were
19 well-established in the market by 2014, is that correct?

20 A. That's one reason, yes.

21 Q. Two, the two products are approved for use on some of the
22 same crops?

23 A. That's another reason.

24 Q. And, three, Syngenta lost exclusivity over both products
25 within several months of each other in 2014, correct?

1 A. Correct.

2 Q. Those were the basic reasons that you concluded mesotrione
3 is sufficiently similar to azoxystrobin?

4 A. I don't know if that list is exhaustive, but those were
5 some of the major reasons, yes.

6 THE COURT: Can we just pause for a second and all
7 stand up for a minute. Take a little pause right after lunch
8 here.

9 BY MR. NEUMAN:

10 Q. So as I understand it, you concluded that mesotrione is
11 sufficiently similar to azoxystrobin in terms of market
12 conditions, market forces, everything that would affect supply,
13 demand, and price to use as a control to account for everything
14 happening in the market other than Willowood, is that right?

15 A. No.

16 Q. How is that incorrect?

17 A. So it's what -- the purpose that I used the mesotrione
18 budget for is with the recognition that Syngenta's azoxystrobin
19 budgets could be off because budgets are sometimes off and that
20 sometimes people -- it's product actually overperform budgets,
21 sometimes they meet budgets, sometimes they underperform
22 budgets. So the sole purpose that I used the mesotrione budget
23 for was to go and analyze how much a similar product met
24 budget, exceeded budget, or underperformed budget.

25 Q. And as I understand it, your conclusion was that the

1 mesotrione budget analysis would give you a basis to determine
2 how to adjust the azoxystrobin variations to account for
3 factors other than Willowood, is that not correct?

4 A. It's to account for the deviations from budget -- from the
5 azoxystrobin budget other than Willowood, yes.

6 Q. So in order to use the mesotrione budgets for that
7 purpose, you have concluded that all of those other factors
8 that could affect supply, demand, and price would have very
9 similar effects on both mesotrione and azoxystrobin, correct?

10 A. Potentially, yes. Potentially, no. But those other
11 factors were controlled for by my azoxystrobin budget
12 benchmark.

13 Q. All right. Let's talk about the three main factors that
14 led you to conclude that the mesotrione was a sufficiently
15 similar product to azoxystrobin.

16 First, you said that they're both well-established
17 products, correct?

18 A. Yes.

19 Q. Now, that in itself is not a sufficient basis to use one
20 as a benchmark for the other, right?

21 A. Not by itself, no.

22 Q. I mean, an iPhone and a Chevy are both well-established
23 products, but that doesn't mean they're benchmarks, right?

24 A. Correct.

25 Q. And you say that they're both used on similar crops,

1 right?

2 A. Yes.

3 Q. They're not used on the same crops, are they?

4 A. I think the testimony was that both are primarily
5 used -- that the main product for both is corn.

6 Q. You've heard testimony that wheat is an important
7 application for azoxystrobin?

8 A. Yes.

9 Q. Mesotrione is not registered for use on wheat, is it?

10 A. No.

11 Q. Azoxystrobin can be applied through irrigation systems,
12 can't it?

13 A. I do not know that.

14 Q. Azoxystrobin is a fungicide, right?

15 A. Correct.

16 Q. It kills weeds? I'm sorry. It kills fungus and diseases?

17 A. Yes.

18 Q. And mesotrione is a herbicide, kills weeds?

19 A. Yes.

20 Q. So farmers use these products for different purposes,
21 correct?

22 A. Correct.

23 Q. You agree that every product faces different market
24 conditions, do you not?

25 A. Again, I hate to using the word "every," but most things

1 have some differences, yes.

2 Q. So let's look at market conditions. As a general matter,
3 would you agree that the price of a product can affect
4 consumers' demand for that product?

5 A. It could.

6 Q. I'm not an economist. Even I understand that, Dr. Wilner.
7 But the demand for some products is more price sensitive than
8 others, correct?

9 A. Correct.

10 Q. Some products are more a matter of choice and discretion,
11 so that if a price goes up, you're more likely not to buy one
12 product than the other, right?

13 A. Makes sense.

14 Q. And when things get tight economically, when you start to
15 feel a financial pinch, that's particularly true, correct?

16 A. It could be.

17 Q. I still have to buy food, but I might decide to give up
18 that movie if times are tough, right?

19 A. It's possible.

20 Q. Do economists have a name for how sensitive consumer
21 demand is to price?

22 A. They have several names, yeah.

23 Q. Is price elasticity one of them?

24 A. It is one of them, yeah.

25 Q. The more price elastic a product, the more sensitive the

1 consumer is going to be to the price?

2 A. Yes.

3 Q. Greater price elasticity means you lose more sales if the
4 price goes up?

5 A. Yes.

6 Q. And the greater the elasticity, the more sales of a
7 product will increase if the price comes down?

8 A. Correct.

9 Q. Now, fungicides --

10 A. All else equal.

11 Q. All else being equal.

12 A. All else equal.

13 Q. Have you performed -- I'm sorry. Fungicides are more
14 price elastic than herbicides, aren't they?

15 THE COURT: If you could just say it a little slower.

16 MR. NEUMAN: I beg your pardon.

17 BY MR. NEUMAN:

18 Q. Fungicides are more price elastic than herbicides, are
19 they not?

20 A. Are you talking about in general?

21 Q. In general.

22 A. Right. In general, fungicides that don't have crop
23 enhancement features, yes, I think I've seen information to
24 suggest that they are more elastic.

25 Q. Is azoxystrobin not more price elastic than mesotrione?

1 A. I have not done such an analysis.

2 Q. You have not performed any statistical analysis on the
3 relative price elasticity of mesotrione compared to
4 azoxystrobin, is that correct?

5 A. I have not done my own analysis.

6 Q. Thank you.

7 A. However --

8 Q. Isn't it true that, all else being equal, in tougher times
9 farmers will reduce their purchase of fungicides before they
10 reduce their purchase of herbicides in order to save costs?

11 A. I do not know that to be true.

12 Q. You've heard the phrase "untreated acre"?

13 A. I have.

14 Q. What does it mean to you?

15 A. It my understanding that an untreated acre is a piece of
16 land that does not have some chemical, be it herbicide,
17 fungicide, pesticide or whatever, being applied to it.

18 Q. It refers to the fact that there are acres of farmland out
19 there that could benefit from the application of, for example,
20 azoxystrobin, but farmers are not buying that product because
21 the price is too high, right?

22 A. Again, not necessarily. And that's -- there could be no
23 benefit from putting on a fungicide. I don't know. It's an
24 individual decision. It's not -- there are multiple items that
25 affect a purchase decision more than just price.

1 Q. Is it your testimony that every sale that Willowood made
2 of azoxystrobin in 2014 would have been made by Syngenta had
3 Willowood not been in the market?

4 A. No, that's not my testimony.

5 Q. And some of that might be due to the concept of untreated
6 acres. Do you agree with me?

7 A. It could be. I've not done any analysis and so I don't
8 know.

9 Q. Now, in fact, Dr. Wilner, from 2013 right through 2014,
10 the price farmers could get for corn, wheat, and soybean
11 dropped substantially, didn't they?

12 A. I think it dropped more for corn than for the others, but
13 yes.

14 Q. And it -- I'm sorry.

15 A. I'm complete.

16 Q. And that happened again, a further decline -- prices for
17 those commodities further declined from 2014 to 2015, correct?

18 A. I believe so, yes.

19 Q. And, in fact, those commodity prices hit a ten-year low in
20 2014 and 2015, did they not?

21 A. I think they did, but I don't recall the comparison of
22 2015 to prior years.

23 Q. Now, the third factor that you identified as the basis for
24 concluding that mesotrione is sufficiently similar to
25 azoxystrobin is that they both came off exclusivity roughly the

1 same time in 2014, is that right?

2 A. Yes.

3 Q. As I understand your opinion, that is because -- the
4 reason that that's important or relevant is because that means
5 that both -- for both products generic companies face
6 significant barriers to entry until the first half of 2014, is
7 that right?

8 A. Again, I think you're just talking about the compound
9 patents because I think the --

10 Q. Yes, I'm talking about the compound patents.

11 A. Okay. Yeah, because there were other process patents for
12 both products that took the -- took exclusivity for longer.

13 THE COURT: That what?

14 Q. Thank you for that clarification.

15 THE WITNESS: That took exclusivity longer.

16 THE COURT: Okay.

17 THE WITNESS: Not for that sentence, but I think you
18 understand my point.

19 Sorry, Your Honor.

20 THE COURT: That's okay. You just talked a little
21 fast.

22 THE WITNESS: Okay.

23 THE COURT: Go ahead.

24 BY MR. NEUMAN:

25 Q. Thank you for that clarification. And this is a key

1 factor in your conclusion that mesotrione is a sufficiently
2 similar benchmark to azoxystrobin, isn't it?

3 A. It's -- all information I utilize is important or key.

4 Q. Well, the fact that they are both well-established
5 products won't do it alone, right?

6 A. Again, probably not, no.

7 Q. Now, that would mean that, in order for mesotrione to be
8 sufficiently similar to azoxystrobin as a benchmark, the
9 opportunities for generics to compete after both products came
10 off exclusive use would need to be very similar for the two
11 products, correct?

12 A. Not necessarily.

13 Q. No?

14 A. Because, again, remember the purpose that I am using it.
15 I'm using mesotrione just for the budget -- budget versus
16 actual difference.

17 Q. If you're citing as a factor that both came off
18 exclusivity at about the same time, what would the relevance of
19 that possibly be if not that it meant the generics who had
20 faced significant barriers of entry through the first half of
21 2014 then have the same opportunity to compete starting in the
22 second half of 2014?

23 A. Because at that time both products became under Rex
24 Wichert's group at the time the post-patent strategy grew. If
25 you remember, there were five pillars that were involved in the

1 post-patent strategy, only one of which was generic
2 competition.

3 Q. So is it your testimony that if generics did not have the
4 same opportunity to compete when both products lost exclusivity
5 that would not matter at all to whether mesotrione is a
6 sufficient benchmark?

7 A. I'm not saying it wouldn't matter at all. I'm just saying
8 that there are multiple factors, five pillars.

9 Q. Now, are you aware that also in 2015 BASF had a product
10 that competed with azoxystrobin that contained a different
11 strobilurin molecule?

12 A. Yes.

13 Q. One of those was Headline, correct, one of the products
14 that BASF sold?

15 A. I believe so, yes.

16 Q. And you're aware that patent, the patent for BASF's
17 product, came off patent in 2015?

18 A. I understand that, yes.

19 Q. And you understand that in anticipation of that event BASF
20 dumped a large quantity of its product into the market?

21 A. I don't know if it's dumped. It's because, in looking at
22 statistics about treated acres for BASF products in 2015,
23 their -- the number of treated acres for BASF actually
24 decreased in 2015.

25 Q. So, in your opinion, the fact that BASF introduced

1 additional quantities in anticipation of its patent expiring
2 had no impact on pricing?

3 A. I'm not saying that. I don't know. Actually, I should
4 say I don't know about BASF's product. I believe Mr. Cecil and
5 others testified it did not have any impact on Syngenta's
6 pricing.

7 Q. Dr. Wilner, isn't it true that Syngenta's 2014 budget for
8 mesotrione overpredicted actual sales by that year for about
9 25 percent?

10 A. I think so, yes.

11 Q. What would Syngenta's price for Quadris Top have been in
12 2014 but for Willowood's generic entry?

13 A. I don't know.

14 Q. 2015?

15 A. That was not necessary for my analysis, so I don't know.

16 Q. 2016?

17 A. I don't know.

18 Q. What would Syngenta's price for Elatus, Aprovia, or
19 Trivapro have been when it came into the market had it not been
20 for Willowood?

21 A. Same answer. I don't know.

22 Q. For that matter, what would Syngenta's price for Quilt
23 Xcel or Quadris have been in 2014 had Willowood not entered the
24 market?

25 A. Same answer. I don't know.

1 Q. How much more volume would Syngenta have sold of any
2 specific product on its azoxystrobin brand ladder --

3 A. As I did not do any --

4 Q. -- had Willowood not entered the market?

5 A. As I did not do any analysis on a particular product
6 brand-by-brand analysis, I don't know.

7 Q. And isn't it true that in 2015 after Willowood and others
8 were selling generic azoxystrobin products, Syngenta estimated
9 that generic volumes for 2016 would only be between 4 and
10 6 percent of all azoxystrobin sales?

11 A. It sounds like something that could have been made, but I
12 don't recall that exact number.

13 MR. NEUMAN: Your Honor, may I approach the witness?

14 THE COURT: All right. What's the exhibit?

15 MR. NEUMAN: Defendant's 128. Your Honor, I move for
16 admission of Defendant's 128.

17 MR. SANTHANAM: No objection, Your Honor.

18 THE COURT: It will be admitted.

19 BY MR. NEUMAN:

20 Q. Please turn to what is Bates stamped as 061685.

21 A. 685?

22 Q. Yes.

23 A. Thank you.

24 MR. NEUMAN: 685, please. Thank you.

25

1 BY MR. NEUMAN:

2 Q. Do you have that in front of you, sir?

3 A. I do.

4 Q. So the title of this exhibit is -- of this page is "2016
5 Top-Down Assumptions Syngenta Fungicide Treated Acres." Do you
6 see that?

7 A. I do.

8 Q. And then if you look at the third bullet, what does
9 Syngenta say there?

10 MR. NEUMAN: Can you blow that up?

11 A. It's 4 to 6 percent of strobilurin market and strobilurin
12 is a mixture product, which is part of the azoxystrobin brand
13 ladder.

14 Q. You think that strobilurin is a mixture product?

15 A. It's -- actually, I apologize. I'm sorry. I was getting
16 confused because it's on azoxystrobin and strobilurin. I'm
17 sorry. Let me take a step back. Yes, I see this that generics
18 are 4 to 6 percent of strobilurin, which is the overall
19 products that generics and brands such as BASF, et cetera,
20 sell.

21 Q. And Syngenta?

22 A. And Syngenta, yes.

23 Q. So, Dr. Wilner, as I understand your testimony, Willowood
24 itself was under 5 percent of the market -- of the azoxystrobin
25 market in 2014 and 2015.

1 A. I believe we talked about that, yes.

2 Q. It was only selling one azoxystrobin product until at
3 least late 2014. It was only selling Azoxy 2SC until at least
4 late 2014, correct?

5 A. Yes.

6 Q. It -- Syngenta had a whole brand ladder designed to
7 anticipate and combat generic activity, correct?

8 A. Correct.

9 Q. There were other generics selling azoxystrobin in 2014,
10 correct?

11 A. Yes.

12 Q. And their combined sales roughly equaled or exceeded
13 Syngenta's azoxystrobin sales in 2014, correct?

14 THE COURT: I'm sorry. What?

15 Q. Roughly equaled or exceeded Willowood's azoxystrobin sales
16 in 2014 and 2015, correct?

17 A. I don't recall the exact numbers, no.

18 Q. And despite all that, your testimony is that Willowood's
19 entry into the market and participation in the market in 2014,
20 virtually by itself, fundamentally transformed the entire
21 azoxystrobin market?

22 A. Yes.

23 MR. NEUMAN: No further questions, Your Honor.

24 THE COURT: All right. How long is your redirect?

25 MR. SANTHANAM: Probably about ten minutes.

1 THE COURT: Okay. Why don't you go ahead.

2 REDIRECT EXAMINATION

3 BY MR. SANTHANAM:

4 Q. Dr. Wilner, you were asked questions about price versus
5 volume. Do you recall those questions?

6 A. I do.

7 Q. And as part of your damages calculations, were they based
8 on price volume or was it separately related to another
9 quantitative element?

10 A. It was related to a separate measure.

11 Q. What was that measure?

12 A. So I did my analysis on gross profits.

13 Q. And does gross profits take into account price and volume
14 in any way?

15 A. It does. In -- what -- there's a formula for gross
16 profits that I think was testified to earlier. Gross profits
17 are sales minus relevant costs, but then if you dig into sales,
18 sales are price times quantity. So I agree that I did not
19 separately analyze price and volume, but what I did is I used a
20 measure that combined it all together and also it subtracted
21 costs.

22 Q. Now, we've heard some testimony about price elasticity,
23 and you were being asked a question about whether you took into
24 account price elasticity, and you said "not my own analysis,
25 but..." and you got cut off. Can you explain how you took into

1 account price elasticity?

2 A. Yes. So it's my understanding that as the -- that there's
3 testimony and analysis that, in general, fungicides are more
4 elastic. That means they change -- that quantity changes more
5 as price changes than herbicides. However, because
6 azoxystrobin has the crop enhancement feature, it is more --
7 it's, again, the opposite of elastic. It's called "inelastic"
8 in economic parlance. So it's less elastic, or more inelastic,
9 than general fungicides.

10 But still, I agree that it is possible that even
11 azoxystrobin is more elastic than herbicides. But still, even
12 if it's more elastic, it shows that my damage calculations are
13 conservative.

14 Q. Dr. Wilner, let me see if we can break that down into
15 layman's terms.

16 A. Sure.

17 Q. So you mentioned plant performance and crop enhancement.
18 How does that translate to whether or not a farmer buys
19 azoxystrobin products?

20 A. So as Mr. Fisher, Mr. Cecil, and Dr. Wichert testified
21 before, that because of the crop enhancement feature, which
22 azoxystrobin is the only fungicide that has this feature, that
23 it is becoming more of a planned purchase, which means that it
24 doesn't change at -- sales do not change as much as when prices
25 change.

1 Q. Now, Dr. Wilner, I think you were asked some questions
2 about Defendant's Trial Exhibit 252, and I want to make a
3 clarification. If we can pull that up. Now if you go
4 to -- you've seen this chart, correct?

5 A. I have.

6 Q. If you go to the column for 2012, you pulled out -- you
7 know, at the bottom where it's highlighted, "Sales about
8 14,000,249?" Do you recall that?

9 A. It's the variation 14,000,249, yes.

10 Q. Did you base your analysis on sales or gross profits?

11 A. Gross profits.

12 Q. What were the -- what was the variation in gross profits
13 in 2012?

14 A. Just over \$4 million.

15 Q. And what percentage of Syngenta's budgeted gross profits
16 does that account for?

17 A. Just trying -- eyeballing, it's probably about 2 and a
18 half, 3 percent, something like that.

19 Q. So Syngenta met its budgeted gross profits in 2012 within
20 about 2 to 3 percent?

21 A. Correct.

22 Q. Now, I'd like to talk about in terms of -- this concept of
23 head start, and I want to clarify between the various patents,
24 so compound patents, '138 patent, and the '761 DABCO patent.
25 If the jury finds that there is infringement of the '138

1 process patent, how does that relate to the head start that
2 Willowood would have obtained?

3 A. So it's -- when I previously stated that Willowood got at
4 least a 12- to 15-month head start, that 12 to 15 months --

5 MR. NEUMAN: Objection, Your Honor. May we have a
6 sidebar?

7 THE COURT: Okay. Well, I'll tell you what. Let's
8 just let the jury take their afternoon break. That will be
9 easier. So, ladies and gentlemen, I'll excuse you for 15
10 minutes. Come back at 3:00. Don't talk about the case or form
11 an opinion. Have no contact with anyone. We'll see you in 15
12 minutes.

13 (At 2:43 p.m., jury excused.)

14 THE COURT: Okay. Your objection?

15 MR. NEUMAN: Your Honor, as we understand the Court's
16 ruling in response to our motion to exclude Dr. Wilner's
17 testimony --

18 THE COURT: You need to speak up just a little.

19 MR. NEUMAN: As we understand Your Honor's ruling
20 concerning our motion to exclude Dr. Wilner's testimony, you
21 indicated that he was allowed to testify that in his opinion
22 Syngenta's damages on account of the two process patents would
23 be at least as much as the damages incurred in connection with
24 the compound patents, period. That's our understanding of your
25 order. There's nothing further in the opinion that indicated

1 that he can then expand on or explain any reasoning beyond what
2 he has testified to about the compound patents.

3 THE COURT: Okay.

4 MR. SANTHANAM: Your Honor, the testimony I'm trying
5 to elicit is merely to show and clarify for the record, okay,
6 there's a separate head start for the compound patents,
7 separate head start for the DABCO patent and the '138 patent.
8 We're not going to get into additional benchmarks as Your Honor
9 addressed in the order with respect to the motion in limine.

10 THE COURT: You're not seeking 75 million times
11 three.

12 MR. SANTHANAM: No.

13 THE COURT: So you're clarifying --

14 MR. SANTHANAM: We're clarifying what the head start
15 is with respect to each of these patents, so that would come
16 out through the testimony.

17 THE COURT: Okay. I don't understand the problem
18 with that, Mr. Neuman.

19 MR. NEUMAN: Well, we defer to Your Honor as to the
20 Court's opinion. Our understanding was that the witness was
21 allowed to opine that the damages would be at least as much,
22 period, but the reasoning and the rationale could go no further
23 than what he testified to support his damages with respect to
24 the compound patents.

25 THE COURT: Well, right, but, I mean, he can still

1 say why he thinks those damages apply to the process patents
2 which is what I'm understanding --

3 MR. SANTHANAM: That is exactly right, Your Honor.

4 THE COURT: Okay. All right. So he can do that. If
5 it's any different from that, you know, you can object after we
6 get the jury back in here.

7 MR. NEUMAN: May I have one point of clarification?
8 I'm sorry.

9 THE COURT: Yes, uh-huh.

10 MR. NEUMAN: I just want to understand. Is the
11 witness allowed to testify that this two-year head start is a
12 reason for finding more than \$75 million?

13 THE COURT: No, that's not what you're offering,
14 right?

15 MR. SANTHANAM: No, Your Honor.

16 THE COURT: No, okay.

17 MR. NEUMAN: Okay.

18 THE COURT: I didn't think so. I mean, if you need
19 to clarify it on recross, you can do that. So you've got a few
20 more minutes on redirect, maybe a little bit of recross.

21 MR. SANTHANAM: Yes, Your Honor.

22 THE COURT: And subject to any exhibits -- stray
23 exhibits that might not have gotten moved into evidence, is
24 this going to be your --

25 MR. SANTHANAM: This will be our final witness.

1 THE COURT: All right. And then you all have a
2 witness you want to get on and off today if you can, is that
3 right?

4 MR. TILLER: Well, here's the problem, Your Honor, on
5 that one. The translator that came from the service that was
6 recommended by the Court isn't much better at speaking English
7 than the witness.

8 THE COURT: Okay.

9 MR. TILLER: And we're very concerned that it's going
10 to be hyper-confusing for the jury. So as much as he doesn't
11 want to stay --

12 THE COURT: He's going to stay.

13 MR. TILLER: He's going to stay. So we have somebody
14 else that I'm hoping -- that's why I was checking my phone.
15 I'm hoping he's sitting out there.

16 THE COURT: Okay. So you do have a witness --

17 MR. TILLER: Or we'll have our video deposition.

18 THE COURT: -- or something. Let's take -- anything
19 else before we take a short break?

20 MR. SANTHANAM: No, Your Honor.

21 THE COURT: We'll be in recess until 3:00.

22 (At 2:47 p.m., break taken.)

23 (At 3:01 p.m., break concluded.)

24 THE COURT: All right. Anything before the jury
25 comes in?

1 MR. SANTHANAM: Yes, Your Honor. Just one
2 clarification now, before the break Mr. Neuman had said
3 Syngenta should not be allowed to ask for anything more than
4 75 million. The opinion that Dr. Wilner has offered is that
5 the damages are at least 75.6, and we intend to use the "at
6 least".

7 THE COURT: Right. But, I mean, you're not trying to
8 go 75 times three or times two or something like that.

9 MR. SANTHANAM: Correct, correct.

10 THE COURT: We'll talk about closing argument later.
11 All right. Let's get the jury home for the day, so anything
12 else before they come in?

13 MR. SANTHANAM: No, Your Honor.

14 (At 3:02 p.m., jury arrives.)

15 THE COURT: All right. Good afternoon again. I
16 believe we were on redirect, so you may proceed.

17 BY MR. SANTHANAM:

18 Q. Dr. Wilner, before we left for the break, I was asking you
19 questions about head start. Now, you mentioned --

20 THE COURT: About what?

21 MR. SANTHANAM: Head start.

22 BY MR. SANTHANAM:

23 Q. You mentioned that there was a potentially 12 -- at least
24 a 12 to 15-month head start.

25 A. Correct.

1 Q. For which patents are you referring to?

2 A. So it's the 12 to 15-month head start relates solely to
3 the two compound patents.

4 Q. And if -- if the com -- even if setting aside infringement
5 of the compound patents, do you believe that Willowood received
6 a head start based on your economic analysis?

7 A. I do.

8 Q. Why is that?

9 A. So it's what they -- what Willowood did is Willowood
10 entered early, before the compound patents expired, as well as
11 the other patents expired, and that allowed them to do certain
12 things, which allowed them to make sales before they would have
13 had they waited until the patents expired; and, additionally,
14 it went -- their entry created an impact, which reduced --
15 which caused Syngenta's sales and prices to be reduced.

16 Q. If the jury finds that there was infringement of the '138
17 process patent, would the head start be longer?

18 A. It would.

19 Q. If the jury finds that there's infringement of the '761
20 DABCO patent, would the head start be longer?

21 A. Even longer, yes.

22 Q. And how does that translate to the damages that you
23 calculated?

24 A. So it's -- if you remember back to my testimony, that what
25 a patent does is give you an exclusive for a period of

1 time. The longer the exclusive, the more profit, additional
2 profits that one would have made, so that if one cuts -- the
3 more one cuts off the exclusive period, the more losses that
4 exist.

5 Q. Now, we've heard a lot about budget variations and
6 accuracy. Do the budgets that you relied on need to be 100
7 percent accurate in order for your calculations to be within a
8 reasonable degree of economic certainty?

9 A. They do not need to be 100 percent accurate.

10 Q. Did you account for variations in budgets in your
11 analysis?

12 A. I did.

13 Q. And what were the methods that you used?

14 A. So it's -- for example, I used the mesotriione additional
15 benchmarks, which accounted for variations that -- and economic
16 events that occurred after the budgets were created.

17 Q. Now, Dr. Wilner, Mr. Neuman had asked you questions about
18 the price decline in 2014. Do you recall that?

19 A. I do.

20 MR. SANTHANAM: I'd like to put up -- David, if you
21 could put up Plaintiff's Demonstrative Exhibit 10, if we could
22 go to Slide 16.

23 BY MR. SANTHANAM:

24 Q. And I think there's some confusion about the price drop
25 from 2013 to 2014. Can you explain for us what we have here,

1 Dr. Wilner.

2 A. Sure. So what this does is this has two graphs which show
3 that Willowood's prices and Syngenta's prices for Syngenta's
4 main products of Quadris and Quilt Xcel as well as comparable
5 Willowood products.

6 Q. And which is Syngenta, which is Willowood?

7 A. So it's that the blue line is Syngenta and Syngenta's
8 prices; the red line is Willowood's prices. On the left I have
9 Syngenta's Quadris and the equivalent Willowood product; on the
10 right I have Syngenta's Quilt Xcel and the relevant comparable
11 Willowood product.

12 Q. And, Dr. Wilner, was there a price decline from 2013 to
13 2014 for these products?

14 A. Yes, there was, based upon that price, yes.

15 Q. Was -- and was there a price decline from 2014 to 2015?

16 A. Yes, there was.

17 Q. Was the price decline from 2013 to 2014 as significant as
18 the price decline from 2014 to 2015?

19 A. Not as significant, no.

20 Q. Based on your economic analysis, was there a volume loss
21 that Syngenta experienced from 2013 to 2014?

22 A. Yes, there was.

23 Q. And can you explain that volume loss.

24 A. Sure. So it's that as Dr. Wichert testified earlier
25 today -- let me take a step back. So it's if you go back to

1 what Mr. Fisher testified to yesterday, he said that after
2 Willowood made its announcement, and this information was known
3 in the market, that Mr. Fisher testified his customers were
4 panicked. They didn't know what to do. And so, as a result,
5 what Dr. Wichert testified to was that because of this
6 uncertainty, the -- Syngenta's customers decided I'm not going
7 to buy that much additional product. Instead, what I'm going
8 to do is I'm going to sell off my inventory.

9 Q. And how does the concept of inventory affect Syngenta's
10 lost profits?

11 A. So it's that these distributors, Syngenta's customers,
12 were still able to service their customers because they had
13 enough product, but they got the product out of inventory,
14 rather than buying from Syngenta; so, as a result, Syngenta's
15 sales declined in 2014.

16 Q. And when distributor inventory shrunk, did that inventory
17 have to go to Willowood in order for Syngenta to lose profits?

18 A. No.

19 Q. Now, Dr. Wilner, in terms of the -- you know, we were
20 talking about the process patent and the DABCO patent. If the
21 jury decides or determines that Willowood infringed the process
22 patent, would your damages calculation apply even if Willowood
23 could have registered its product without infringing the
24 compound patents by, say, importing it and using azoxy before
25 the compound patents expired?

1 THE COURT: I'm sorry, that was an awfully long
2 question, so would you ask it --

3 MR. SANTHANAM: I'll repeat it. I'll repeat or
4 rephrase it.

5 THE COURT: Okay.

6 BY MR. SANTHANAM:

7 Q. If the jury decides that Willowood infringed the process
8 patent, would your damages calculation apply even if Willowood
9 could have registered its products without infringing the
10 compound patents?

11 A. If the jury finds that the compound patents were not
12 infringed, but the -- or were not infringed, or that they could
13 have used some other method to get around the compound patents,
14 then -- but there was still infringement of the process patent,
15 my damage calculations would still hold.

16 Q. Mr. Neuman mentioned something along the lines of three
17 main reasons why you believe the meso -- mesotrione or the meso
18 benchmark is similar to azoxy. Do you recall those questions?

19 A. I do.

20 Q. Now, one of those, I think, was they were both best
21 selling products. Can you explain that?

22 A. Sure. So it's these were top selling products of
23 Syngenta, both the mesotrione as well as the azoxystrobin, and
24 so because of that, there was a lot of emphasis on those
25 products and that they were prominent within the whole product

1 portfolio that Syngenta had.

2 Q. And were there similarities in the budgetary process?

3 A. Yes. So it's as both Mr. Cecil and Mr. Fisher testified
4 to, that there are peer reviews that first you have each
5 product lead for azoxystrobin and for mesotrione, which, again,
6 I want to remind is that Mr. Fisher is the product lead for
7 azoxystrobin overall, not for -- they don't have a separate
8 product lead for Quadris versus Quilt Xcel. It's just one big
9 azoxystrobin. So they go through it, then it goes up to other
10 people. You have peer reviews where the meso people talk to
11 the azoxystrobin people, so it's a similar process, yes.

12 Q. That was the general process. Were there similarities in
13 the market factors that are considered in the process for azoxy
14 and meso, as far as you found?

15 A. Yes, because both products are primarily used on corn.
16 What both the meso budget as well as the azoxy budgets had to
17 do was they had to take into account factors that affect corn.
18 What's the price of corn? How many acres of corn are being
19 planted, and things like that.

20 Q. And Mr. Neuman mentioned, you know, the loss of
21 exclusivity in 2014, you know data exclusivity for meso versus
22 loss of the compound patents in 2014. Were there other life
23 cycle similarities between azoxy and meso that you took into
24 account?

25 A. Sure. So it's both were, again, well established

1 products. Both were -- had higher rungs of the brand ladder,
2 with the premium products. Premium products were both
3 introduced for azoxystrobin and for mesotrione as well as
4 fighting brands were introduced for both.

5 Q. Did mesotrione and azoxy both have established brands?

6 A. They did.

7 Q. Did they both have enhanced brands?

8 A. They did.

9 Q. What about combinations of products?

10 A. They did, because sometimes they were combined with each
11 other.

12 MR. SANTHANAM: No further questions, Your Honor.

13 THE COURT: Any questions on the matters covered in
14 redirect?

15 MR. NEUMAN: A few very short questions, Your Honor.

16 THE COURT: All right.

17 RECROSS-EXAMINATION

18 BY MR. NEUMAN:

19 Q. Dr. Wilner, you're talking about your view as to damages
20 as to the --

21 A. I'm sorry, I couldn't hear you.

22 Q. You were talking about your opinions concerning the
23 infringement or alleged infringement of the process patents,
24 the '138 and the '761. Now, do you have -- you don't have an
25 opinion as to whether Willowood infringed the '761 or '138

1 patents, correct?

2 A. My calculations are all based upon the assumption that the
3 finder of fact determines that there was infringement.

4 Q. You don't have an opinion as to whether those patents were
5 infringed, correct?

6 A. I do not have an opinion, no.

7 Q. Now, again, lost profits calculation requires, among other
8 things, the determination of what would have happened in the
9 but-for world, that is had the infringement not taken place,
10 correct?

11 A. In the methodology I used, yes.

12 Q. So with respect to the '761 patent, the DABCO patent, in
13 order for Syngenta to have suffered lost profits as a result of
14 allegedly infringing the '761 patent, you would have to find
15 that there was no feasible way for Willowood to have made
16 azoxystrobin without the DABCO patent, correct?

17 A. In that what you would have to do is you would have to
18 investigate the but-for world so, yes.

19 Q. And if there were a way in the but-for world for Willowood
20 to have feasibly manufactured and sold azoxystrobin without
21 infringing the '761 patent, there would be no lost profits
22 damages associated with the infringement of the '761 patent,
23 correct?

24 A. If there is a way to design around, yes.

25 Q. One last question, sir -- perhaps two questions, but one

1 topic. Tell me again what year it was that you concluded that
2 will the wide budget variation in the azoxystrobin budget
3 compared to actuals was due to drought conditions?

4 A. I'm sorry, say that again.

5 Q. Yes. You concluded that for one of the years, it was 2012
6 or 2013 -- it was 2013, I believe?

7 A. Correct.

8 Q. The disparity between the azoxystrobin budget versus
9 actuals was due to drought conditions. Do you recall that?

10 A. I do.

11 Q. Now, you've also testified that one -- that your
12 understanding is one of the great benefits of azoxystrobin is
13 that it provides crop enhancement, correct?

14 A. Correct.

15 Q. If azoxystrobin had that sort of crop enhancement feature,
16 why, nonetheless, would sales have gone down so much in a
17 drought year?

18 A. Well, sales did not go down in the drought year; sales
19 went down in the year subsequent to the drought year.

20 Q. Was the drought in '12 or '13?

21 A. The drought was in '12.

22 Q. You still had the crop-enhancement features in 2012 as it
23 did in 2013, correct?

24 A. It did, yes.

25 MR. NEUMAN: No further questions.

1 THE COURT: Anything else?

2 MR. SANTHANAM: Well, Your Honor, just a couple of
3 brief questions.

4 REDIRECT EXAMINATION

5 BY MR. SANTHANAM:

6 Q. Dr. Wilner, you were asked about in calculating the
7 but-for world looking at alternatives.

8 A. Yes.

9 Q. As part of your economic analysis, do you have to consider
10 whether those alternatives are economically feasible or
11 available?

12 A. You have to consider whether or not it's feasible, not
13 just that it -- does it exist.

14 Q. And have you seen any alternatives presented to you that
15 make it clear that there were economically available
16 alternatives for the '138 patent?

17 MR. NEUMAN: Objection, outside the scope. I didn't
18 ask about the '138 patent.

19 THE COURT: Well, sustained.

20 MR. SANTHANAM: No further questions, Your Honor.

21 THE COURT: All right. Thank you. You may step
22 down.

23 THE WITNESS: Thank you.

24 THE COURT: Further evidence for the plaintiff?

25 MR. LEVINE: No, Your Honor. The plaintiff,

1 Syngenta, rests its case. We do have some motions to make but
2 we rest our case. The evidence is in.

3 THE COURT: All right. Ladies and gentlemen, let me
4 excuse you to the jury room just for a few minutes. In between
5 who gets -- who's putting evidence on, I always excuse the jury
6 for a minute. You just had a break, and I don't think we'll be
7 talking for very long, so don't get too comfortable, but I'll
8 excuse you to the jury room. Don't talk about the case.

9 (At 3:18 p.m., jury leaves.)

10 THE COURT: Further evidence for the Plaintiff?

11 MR. LEVINE: No, Your Honor. The Plaintiff,
12 Syngenta, rests its case.

13 We do have some motions to make, but we rest our
14 case. I think the evidence is in.

15 THE COURT: All right. Ladies and gentlemen, let me
16 excuse you to the jury room just for a few minutes. In between
17 who gets -- who's putting evidence on, I always excuse the jury
18 for a minute. You just had a break, and I don't think we'll be
19 talking for very long, so don't get too comfortable. But I'll
20 excuse you into the jury room. Don't talk about the case.

21 (At 3:18 p.m., jury excused.)

22 THE COURT: Okay.

23 MR. LEVINE: Thank you, Your Honor. Syngenta moves
24 under Rule 50(a) for judgment as a matter of law with respect
25 to the infringement issue on the compound patent; namely, that

1 Willowood, Limited, made a sale, import, or otherwise
2 infringing activity in the United States. We move under Rule
3 50(a) for judgment as a matter of law with respect to
4 willfulness with respect to the compound patent. And we move
5 under Rule 50(a) for a judgment as matter of law with respect
6 to infringement of the '138 patent.

7 THE COURT: All right.

8 MR. LEVINE: And we'll be filing the motion itself
9 with ECF later today.

10 THE COURT: All right. I'll just take that under
11 advisement and hear from you all later. Does Willowood want to
12 be heard at the close of the Plaintiff's evidence?

13 MR. TILLER: Yes, Your Honor. We would be moving for
14 judgment as matter of law as well on the '761 patent --

15 THE COURT: Say again.

16 MR. TILLER: -- on the '761 patent claim and on the
17 damages claims -- or on the claims for damages. I guess
18 that's --

19 THE COURT: As to all of them? You're nodding yes?

20 MR. TILLER: Yes. I'm sorry, Your Honor.

21 THE COURT: Okay. Well, I think since I shifted the
22 burden of proof on the '761 --

23 MR. TILLER: We realized that issue, Your Honor. We
24 just want to make sure because of, you know, all those rules
25 about preserving the record.

1 THE COURT: That's fine. All right. I'll hear from
2 you all later to the extent you want to be heard on any of
3 those issues, and I'll just take it under advisement for the
4 time being. And Willowood's ready to call a witness?

5 MR. NEUMAN: Yes, we are.

6 THE COURT: All right. Yes?

7 MR. COUGHLIN: May I -- as I understand, Ms. Kay is
8 going to testify.

9 THE COURT: Who?

10 MR. COUGHLIN: Ms. Kay, Janelle Kay.

11 MR. NEUMAN: That's correct.

12 THE COURT: All right.

13 MR. COUGHLIN: And before we started that, before the
14 jury came in, if we could revisit -- the Court may remember
15 there was a motion to exclude Ms. Kay's testimony, and the
16 Court entered an order on that. And I believe the Court's
17 order allows her to testify but constrains her to be a fact
18 witness.

19 THE COURT: Right.

20 MR. COUGHLIN: And says that if she had -- was to
21 offer hypotheticals or stray into expert opinion, we could
22 object.

23 THE COURT: Yes.

24 MR. COUGHLIN: Two parts to this. One is, I assume,
25 like every witness, there will be some measure of background to

1 introduce Ms. Kay as to who she is. But we have declarations
2 with all kinds of experience to lay a foundation for her expert
3 testimony in the record. And it would seem to me inappropriate
4 for her to go on like she's going to testify as a witness -- as
5 an expert witness, and, in fact, it's fact testimony.

6 I wouldn't want to object in front of the jury on
7 that issue unnecessarily. I do raise the issue with the Court.

8 THE COURT: Well, you went into a right fair amount
9 with all your fact witnesses. So, assuming that it doesn't go
10 in any different from that.

11 MR. COUGHLIN: And that's fine. She has a
12 declaration about testifying for the Court and in arbitrations
13 and the like.

14 THE COURT: Okay. Well, you can object in front of
15 the jury, that is -- or ask for a sidebar, but I assume they'll
16 stick to the basics. But you're certainly allowed to go over
17 her background. Everybody's been doing that.

18 MR. COUGHLIN: I wasn't suggesting to the contrary.

19 The second issue would be to the extent that they did
20 stray into opinion or expert opinion testimony, I would simply
21 object on the basis of the Court's prior order, without
22 necessarily trying to articulate the basis for the jury.

23 THE COURT: That's fine. I'll take that to mean
24 undisclosed expert testimony --

25 MR. COUGHLIN: Or hypotheticals.

1 THE COURT: -- or hypotheticals. Okay. All right.
2 That's fine. All right. Bring the jury in if they're ready.
3 (Jury returns.)

4 THE COURT: All right. Ladies and gentlemen, since
5 Syngenta's presented its evidence on the -- and it's now
6 Willowood's turn. So we will proceed, and Willowood can call
7 their first witness.

8 MR. NEUMAN: Thank you, Your Honor. The defendants
9 call Janelle Kay.

10 THE COURT: Come up. Go ahead.

11 MR. NEUMAN: Thank you, Your Honor.

12 **JANELLE KAY,**

13 **DEFENDANT'S WITNESS, SWORN AT 3:24 P.M.**

14 **DIRECT EXAMINATION**

15 BY MR. NEUMAN:

16 Q. Good afternoon, Ms. Kay.

17 A. Good afternoon.

18 Q. Can you tell the jury how you're employed, please.

19 A. I am president and CEO of Pyxis Regulatory Consulting.

20 Q. And what is Pyxis?

21 A. Pyxis is a consulting firm that helps companies register
22 and maintain pesticide registrations in the United States.

23 Q. And how many -- how many employees does Pyxis have?

24 A. We have 10 employees including myself.

25 Q. And how many of them are professionals?

1 A. Eight professionals.

2 Q. When was Pyxis formed?

3 A. 1999.

4 Q. And you formed it?

5 A. Yes.

6 Q. Could you describe briefly your educational background?

7 A. I have double majors in biology and chemistry, and I have

8 a masters in business, specializing in technology and

9 innovation management.

10 Q. And when did you graduate with your masters?

11 A. My masters was 2000.

12 Q. And how were you first employed after graduating with your

13 bachelors?

14 A. With my bachelor's degrees, I was originally with the

15 United States Geological Survey in the Water Resources

16 Division. And I was helping monitor dioxin contamination and

17 nitrate contamination in groundwater.

18 Q. When did you leave that -- when did you leave that -- was

19 that a full-time position?

20 A. Technically, it was part-time position. It was during

21 another recession, so there was -- it was a part-time position.

22 I left in 1993 and went to work for another company called

23 Compliance Services International.

24 Q. Do you we refer to that as CSI?

25 A. Yes.

1 Q. What is the business of CSI?

2 A. They also do regulatory consulting to companies in the
3 pesticide industry, helping them register pesticide products.

4 Q. What did you do at CSI?

5 A. I had a variety of roles. I worked in the analytical
6 laboratory doing analytical determinations. I did residue
7 chemistry, physical-chemical characteristic testing. I was in
8 the quality control, Quality Assurance Department, so auditing
9 studies for compliance for EPA registrations, and, eventually,
10 was promoted to Manager of Regulatory Affairs, where I managed
11 registration programs and helped design registration programs
12 for pesticide registrants.

13 Q. And I'm sorry. What year did you form Pyxis?

14 A. 1999.

15 Q. And can you summarize the categories of types of work that
16 Pyxis does for its clients?

17 A. We are a wide-ranging consulting firm that we help
18 companies maintain and obtain pesticide registrations. Some of
19 our clients are larger, and so they only use us when they
20 have -- when they need the extra capacity, that we're helping
21 them on a certain area.

22 For other clients, we are the entire regulatory
23 department. So we design the registration programs, we place
24 the required studies, we prepare the application for
25 registration, submit that to the Environmental Protection

1 Agency, or EPA, work with EPA on getting the registration. And
2 once we obtain the registration, we would submit the
3 applications to each of the states, because before you can sell
4 product or distribute product in the states, you also have to
5 get a state registration.

6 Then, once the registration has been approved, it can
7 go through a re-evaluation process with EPA. And so we would
8 help them through that process and monitor and manage the
9 process, and place the required studies, and do whatever is
10 necessary to make sure that they are in compliance.

11 Q. In your experience, after an applicant obtains an end-use
12 registration from EPA, how long does it typically, then, take
13 to obtain state registrations?

14 A. It depends on the state. Some states take a little bit
15 longer. But I would say the majority -- the vast majority,
16 95 percent, is usually about one to two months.

17 Q. And about how many registration applications has Pyxis
18 submitted to EPA on behalf of its clients?

19 A. I'd estimate we've submitted over 1,000 registrations.

20 Q. And are those for generic companies or original branded
21 products, or some mix?

22 A. It's a mix. We've done both. The vast majority have
23 certainly been the generic or me-too registrations.

24 Q. What role have you personally played in those
25 applications?

1 A. I've personally obtained several hundred registrations,
2 and now, given the size of our company, I'm mostly managing our
3 employees that are doing that process. I'm still designing the
4 registration programs for our clients, but I'm having my
5 employees do the actual applications.

6 Q. What type of pesticides does Pyxis register?

7 A. We've registered fungicides, herbicides, insecticides,
8 rodenticides, plant growth regulators.

9 Q. And, to your knowledge, are there any other firms who have
10 handled as many generic registrations under FIFRA as Pyxis has?

11 A. No, not to my knowledge.

12 Q. I'm sorry. I referred to FIFRA. That -- you understand
13 that to be the statute that regulates the registration of
14 pesticides in the United States?

15 A. Yes.

16 Q. Does the EPA consider azoxystrobin a fungicide?

17 A. Yes, it does.

18 Q. And does it regulate it accordingly?

19 A. Yes.

20 Q. So, have you become knowledgeable about the EPA's review
21 process for pesticide registrations including fungicide
22 registrations?

23 A. Yes.

24 Q. Do you interact and communicate with EPA personnel during
25 that process on a regular basis?

1 A. Yes, of course.

2 Q. Did Pyxis have any involvement in the applications filed
3 by Willowood in this case for EPA registrations of any products
4 containing azoxystrobin?

5 A. Yes. Pyxis prepared the applications for registration.

6 Q. Which applications did Pyxis prepare?

7 A. For Willowood, we prepared Azoxy 2SC and AzoxyProp
8 applications for registration, so two.

9 Q. Did you prepare a technical registration for azoxystrobin
10 in connection with Willowood?

11 A. That was submitted under Greenfields.

12 Q. Were you involved -- was Pyxis involved in the submission
13 of that application?

14 A. Yes. We also prepared that application for registration.

15 Q. And was that work at Pyxis done by you or under your
16 supervision and oversight?

17 A. It was done by my oversight. I did not actually conduct
18 the work.

19 Q. But you supervised and oversaw that?

20 A. Yes, I did.

21 Q. Now, in your experience, when an application for a generic
22 pesticide is filed, does a description of the process for
23 making that product have to be filed with EPA as part of the
24 application?

25 A. Yes. That is required.

1 Q. What kind of description is required?

2 A. It's a detailed step-by-step description of the
3 manufacturing process that needs to have enough detail that EPA
4 can review it and potentially recreate that process on their
5 own.

6 Q. Does the manufacturing process, in your experience,
7 usually entail just one step or more than one step?

8 A. Almost always, it's multiple steps.

9 Q. And in those cases, in your experience, does the written
10 process descriptions submitted to EPA typically identify every
11 company and each facility that carries out every step in the
12 process that makes each intermediate product in the process?

13 A. No. Generally, we just identify the very last company to
14 do the -- that does the last manufacturing step that we have.
15 We don't provide each and every step of who's doing each step
16 of the manufacturing process.

17 Q. And when that's the way it's submitted, have you ever had
18 EPA come back and say, we need to know the identity of every
19 facility that carries out each step in the process and makes
20 each intermediate product in the process?

21 A. No, I've never seen EPA come back and ask that question.

22 Q. Now, you're familiar with the process description for
23 azoxystrobin technical that was filed by Pyxis on behalf of --
24 under Greenfields' name?

25 A. Yes.

1 Q. And you're aware that that application actually identified
2 specific companies and facilities for each step in the process?

3 A. Yes, I am aware of that.

4 Q. Why was it done -- why was that done if it's not gen -- in
5 this case when it's not generally done that way?

6 A. We were provided that information by the sponsor, and so
7 we -- it just included that as part of the manufacturing
8 process.

9 Q. Does Pyxis ever file revisions to the original application
10 materials due to some mistake in the original application?

11 A. Yes.

12 Q. And how would the need to do that, to revise an
13 application, typically come to Pyxis's attention?

14 A. That's typically when the registrant notifies us that a
15 change needs to be made or a mistake was made in the original
16 application, and so they ask us to make a revision.

17 Q. In the case of azoxystrobin, did Pyxis ever file a revised
18 process description after the initial description was submitted
19 to the EPA?

20 A. Yes, it did.

21 Q. And that was a revision of the description of the
22 manufacturing process?

23 A. It was -- there were minor changes to the process. But
24 I'd say the primary change was a change in the facility that
25 was doing the etherification step.

1 And it was notified to us by one of Willowood's
2 employees, SSJ, he went to a site visit and notified that --
3 identified that it was actually being done by a facility called
4 Guosheng, not Tai He. And I apologize for my mispronunciation,
5 if at all.

6 And we also had a deposition transcript from somebody
7 called Mr. Wu that I reviewed as well that identified that
8 Guosheng actually conducted the etherification step. And that
9 was the major change that warranted the notification to EPA.

10 Q. And that corrected process description is now on file with
11 the EPA?

12 A. Yes, it is.

13 Q. Now, you're familiar with chemical testing that was done
14 by ARC Labs to support the application -- Willowood's
15 application for its azoxystrobin end-use products in this case?

16 A. Yes, I am.

17 Q. And what type of tests did ARC Labs perform?

18 A. I would say these are probably the most basic tests that
19 are required for an EPA registration. They're called
20 physical-chemical characteristics tests, so they look at things
21 such as color, odor, is it a solid, is it a liquid, what's the
22 pH.

23 Q. Do those tests go by any common name or slang or
24 abbreviation?

25 A. Those are called physical-chemical characteristics.

1 Q. Also known as phys-chem?

2 A. Yes.

3 Q. Now, in the course of assisting its clients to obtain
4 pesticide registrations from EPA, does Pyxis often play a role
5 in connection with those tests?

6 A. For many of our clients, they ask us to place the studies
7 on their behalf and monitor them at the laboratories. So our
8 role is acting on behalf of our clients to make sure that the
9 studies are conducted in accordance to EPA guidelines and will
10 meet their requirements.

11 Q. So have you become familiar with the laboratories that are
12 capable of doing these kinds of tests to EPA satisfaction?

13 A. Yes.

14 Q. In your experience, can these phys-chem tests only be done
15 by laboratories in the United States?

16 MR. COUGHLIN: Objection, based on the Court's prior
17 order.

18 THE COURT: Well, overruled. You can answer.

19 THE WITNESS: No. They can be conducted anywhere in
20 the world as long the studies comply with EPA data
21 requirements, EPA formatting requirements. And a component of
22 the requirement's called the good laboratory practices. So as
23 long as those studies are conducted in compliance with all of
24 those, EPA will review and could accept those data.

25

1 BY MR. NEUMAN:

2 Q. And have Pyxis clients used laboratories outside of the
3 United States for these types of phys-chem tests?

4 A. Yes. We've used laboratories such as Jai Research
5 Foundation, which is based in India, Agrifor Scientific Limited
6 based in Australia. Those are a few examples of some
7 laboratories that we've used to do some phys-chem work.

8 Q. And in your experience, does EPA accept these tests
9 conducted by these overseas laboratories for purposes of
10 applications and registrations of pesticides?

11 A. Yes. Again, provided that they're conducted in accordance
12 with EPA guidelines and are in accordance with good laboratory
13 practices, EPA will accept those data.

14 Q. In your experience, does the time that the EPA takes to
15 review these kinds of tests vary depending on whether they're
16 done overseas or in the United States?

17 A. No, the timing would be the same. EPA has a very mandated
18 policy. The categories of applications for registration
19 doesn't change depending on where the laboratory is located
20 that did the studies.

21 Q. In your experience, does it cost your clients any more to
22 have these phys-chem tests done outside the United States
23 rather than inside the United States?

24 MR. COUGHLIN: Objection, Your Honor.

25 THE COURT: Well, I mean, no. Overruled. You can

1 answer. Go ahead.

2 THE WITNESS: No, the costs are nominal in the big
3 scheme of things for companies. They're about 10- to \$15,000,
4 and because there are a number of laboratories, it's fairly
5 competitive and so the costs are pretty much the same.

6 BY MR. NEUMAN:

7 Q. In your experience, have your clients ever had difficulty
8 getting those tests done by overseas labs in the time frame
9 that they requested?

10 A. No, not in my experience. Oftentimes, the laboratories
11 even will allow you to pay a premium to have it done faster,
12 but they are usually pretty quick studies anyway.

13 Q. What kind of a premium are we talking about?

14 A. It depends on the laboratory, but 25 to 50 percent. Also,
15 it depends on how fast you want it to be conducted.

16 Q. And that's 10 to 25 percent on the cost that otherwise
17 would have been incurred?

18 A. And it's actually 25 to 50 percent is usually what I've
19 seen, but, yes, 25 to 50 percent of additional on top of the
20 10- to 15,000. So you would be looking at anywhere from 12,500
21 to 23,000, in that neighborhood for the expedited.

22 Q. So that premium would be pretty nominal in the scheme of
23 things?

24 A. In the scheme of things, that's correct.

25 Q. Now, let me talk to you about product formulation for a

1 moment.

2 You're aware that the product formulation work done
3 on Azoxy 2SC and AzoxyProp Xtra for Willowood was performed by
4 a facility in the United States?

5 A. Yes.

6 Q. Does Willowood ever play a role in that type of product
7 development, the formulation work? I'm sorry. Pyxis ever play
8 a role in that type of product formulation work?

9 A. I'm sorry. We don't actually do the formulation work, but
10 sometimes companies will approach us, our clients will approach
11 us, and ask us to find a facility to do the formulation work
12 and develop a formulation for pesticide registration.

13 Q. And are those facilities that do that type of formulation
14 work only available in United States?

15 A. No.

16 Q. They're available outside the United States --

17 A. Of course.

18 Q. -- as well?

19 A. Yes.

20 Q. And does that include for fungicide products?

21 A. Irrespective of the type of pesticides, so fungicides,
22 herbicides, that's correct. It can be done outside of the
23 United States.

24 Q. And in your experience, is there a significant difference
25 in the prices charged by overseas labs compared to United

1 States labs to conduct this type of product formulation?

2 A. No, those are typical -- excuse me. Let me restart.

3 That's -- they're very comparable between the US and foreign

4 laboratories.

5 Q. In your experience, does it matter to EPA whether the

6 product formulation work is done in the US or outside the

7 United States?

8 A. No. EPA doesn't require the submission of that

9 information. So EPA would never see it and never know, and so

10 they don't care about it.

11 Q. Let me talk to you for a moment, Ms. Kay, about labels.

12 Did you and Pyxis play any role in the writing of the labels

13 for Willowood's azoxystrobin products?

14 A. Yes, Pyxis prepared those labels.

15 Q. Is it common for Pyxis to submit labels for its generic

16 clients?

17 A. Well, yes, it is common. That's part of the application

18 for registration process. EPA carefully reviews and ultimately

19 approves the label that's been submitted, and that's part of

20 the registration. So the label is a requirement for the

21 registration.

22 Q. And is it common for Pyxis to copy large portions of a

23 branded label or a previously submitted label when it submits a

24 label for its generic client?

25 A. Yes, it's common to use the same language for preparation

1 of a label of a "me-too" product.

2 Q. And why does Pyxis do that? Why is it common?

3 A. Well, EPA has strongly encouraged that the labels be
4 substantially similar, if not identical. So the statute
5 actually has that language that the labeling needs to be
6 identical or substantially similar.

7 MR. COUGHLIN: Objection, Your Honor, in terms of the
8 law.

9 THE COURT: Well, she can explain how the process
10 works and her experience, what she did in this case. So to
11 that extent, her understanding is relevant. Go ahead.

12 THE WITNESS: So for substantially similar products,
13 which is azoxystrobin products, the Willowood Azoxystrobin
14 products are substantially similar to Syngenta's products; and
15 in order to be substantially similar, they need to be
16 substantially similar in the labeling as well, and EPA strongly
17 recommends that that language be very, very close. There's
18 even portions that EPA mandates the language and that there's
19 no option on that, that it's in the regulations; this is what
20 you need to put on your label.

21 BY MR. NEUMAN:

22 Q. In your experience, has EPA ever rejected a proposed
23 generic label because it is too similar to the previously
24 approved label?

25 A. Because it's too similar, no. We've had EPA actually come

1 back to us and ask us to change the language when they felt
2 that we've revised it too far away from the original language.
3 They've asked us to change it back to be more similar.

4 Q. In your experience, does the time that it takes EPA to
5 review a proposed label for generic differ based on whether
6 that label is worded substantially the same as a previously
7 submitted label, approved label?

8 A. No, the time frames at EPA would be the same.

9 Q. Now, did Willowood -- you testified that Pyxis prepared
10 the azoxystrobin end-use product labels for Willowood that are
11 at issue in this case. Did Willowood personnel personally
12 review the label language before Pyxis submitted it to EPA?

13 A. No.

14 Q. Is that common for your clients not to review the specific
15 label language throughout the label that Pyxis drafts?

16 A. Yes, that's fairly common, yeah.

17 Q. Now, in this case, you're aware that the label initially
18 submitted to EPA drafted by Pyxis for Willowood's end-use
19 product contained the word "Syngenta" rather than Willowood in
20 one line on one page of the label?

21 A. Yes, I am aware of that. We--

22 Q. How did that happen?

23 A. It was a mistake. It was a multiple-page label. I can't
24 remember the number of pages. I want to say in the 50 range,
25 and we had somebody prepare the label. It was peer-reviewed

1 internally, and it had a second peer review, and it was missed,
2 and it was in the middle of the text on I think page 6; and EPA
3 reviewed it as well and didn't catch it either. So it was a
4 mistake.

5 Q. Was this error ever corrected?

6 A. Yes.

7 Q. When?

8 A. As soon as we were notified by Willowood, we made the
9 correction.

10 Q. And making the correction, what does that mean? What's
11 that process?

12 A. We went into the Word document. We use Word to prepare
13 the labels that EPA approves, and we just modified it on that
14 version, and then Willowood also modified it on the printed
15 version, and so they just modified it and printed a new label.

16 Q. And then after you revised it, where does it go?

17 A. On the jug. There's -- it doesn't have to go to EPA. It
18 was a mistake.

19 Q. EPA doesn't require resubmission?

20 A. No. A mistake -- the EPA would consider that a
21 typographical error, so they say just fix it. There's a
22 notification that allows you to do that.

23 Q. In the course of preparing either of Willowood's end-use
24 azoxystrobin labels, did Willowood ever tell you to hurry it up
25 or move quicker than you were?

1 A. No.

2 Q. Did it ever give you a deadline and say get it done by
3 this date and you're not meeting it?

4 A. No. I don't remember. I don't --

5 MR. NEUMAN: Nothing further, Your Honor.

6 THE COURT: All right. Questions?

7 MR. COUGHLIN: Yes, Your Honor. We have a binder.

8 THE COURT: Okay.

9 MR. COUGHLIN: May I approach the witness, Your
10 Honor?

11 THE COURT: You may.

12 MR. COUGHLIN: Your Honor, this binder has four
13 exhibits, two of which are already into evidence, Plaintiff's
14 Trial Exhibit 9 and Plaintiff's Trial Exhibit 41. It also
15 contains Plaintiff's Trial Exhibit 42 and Plaintiff's Trial
16 Exhibit 44, and we would move the admission of those exhibits.

17 MR. NEUMAN: No objection.

18 THE COURT: They'll be admitted.

19 CROSS-EXAMINATION

20 BY MR. COUGHLIN:

21 Q. Good afternoon, Ms. Kay.

22 A. Good afternoon.

23 Q. In connection with your work -- or in connection with
24 Pyxis' work on behalf of Willowood, did it understand that
25 there was a current patent covering the compound for

1 azoxystrobin that was still active in the United States?

2 Do you want me to rephrase that? I didn't say it
3 very well.

4 A. Could I ask you a clarifying question? You said "it."

5 Are you referring to Pyxis or Willowood?

6 Q. Did Pyxis know when it was doing its work to submit a
7 registration application to the US EPA that Syngenta had two
8 patents in the United States covering the compound of
9 azoxystrobin that were still alive and well?

10 A. I believe Willowood informed us that there was a patent,
11 but we don't get involved in patent stuff, and so I -- as far
12 as exactly what those patents are, I have no knowledge.

13 Q. So you indicated earlier -- is Pyxis' business limited to
14 assisting its customers or clients to apply for and obtain
15 registrations for pesticides in the US, the US EPA?

16 A. We do US EPA work, state work, and we also do some
17 Canadian work.

18 Q. In terms of your experience with having clients do tests
19 outside of the United States for -- to help support or to
20 support an application, are those for tests for clients who are
21 trying to get a registration for a compound which is actually
22 under patent in the United States?

23 A. We have had work done outside the United States when the
24 compound is under patent, but there are also a number of
25 companies that routinely use foreign laboratories regardless of

1 the patent status.

2 Q. Well, in this particular case, Pyxis knew, did it not,
3 that, in fact, azoxystrobin had been imported into the United
4 States for purposes of formulation and testing to support the
5 application?

6 A. Yes.

7 Q. Okay. And you said that at some point you believe
8 Willowood indicated that there was a patent that covered the
9 compound for azoxystrobin?

10 A. I can't remember exactly what Willowood told Pyxis and who
11 at Pyxis might have been told, but I believe that we were
12 informed that there was some patent. I don't know exactly what
13 the patent was.

14 Q. Did Mr. Heinze ever call and say to Pyxis, we've imported
15 azoxystrobin into the United States, we've form -- we've used
16 the azoxystrobin in the United States, can we -- what should we
17 do? Did Willowood ever bring that to Pyxis' attention?

18 A. If it did -- and I don't think that Willowood would have
19 asked that question, but if it did, I would have said, I am not
20 a patent expert, so you'll have to speak to a patent attorney.

21 Q. Are there other occasions in which Pyxis has assisted
22 clients in seeking registrations with the EPA in which the
23 clients have infringed US patents in connection with the
24 application of EPA registrations?

25 A. I don't know if a client might be infringing on a patent

1 because I don't get involved in patents.

2 Q. Well, you're involved in the EPA registrations, correct?

3 A. That's correct.

4 Q. And you represent a lot of generic manufacturers or
5 suppliers, correct?

6 A. Yes.

7 Q. And this is a heavily regulated industry, correct?

8 A. Yes, it is.

9 Q. And there's also a lot of patents in the industry, isn't
10 that right?

11 A. That's right.

12 Q. Is -- do I understand that Pyxis doesn't care whether
13 there's a patent or not a patent? Does it give clients advice
14 about how to try and go through a registration even though
15 there's a patent in the United States that would be infringed
16 if the products were imported into the United States?

17 A. Well, again, we're not patent experts, and we don't get
18 involved in patent issues or advice, so certainly not patent
19 attorneys, but in my experience with EPA, that EPA
20 doesn't -- it's not involved in patent issues either. So EPA
21 will review and process an application for registration
22 regardless of the patent status.

23 Q. Well, Pyxis does deal with clients who are dealing with
24 patent issues and does interact with patent attorneys on a
25 regular basis, doesn't it?

1 A. Our clients may, but we have very little involvement with
2 any patent attorney.

3 Q. If you could get the binder that I handed you. If you
4 could open it up, please, and look at Exhibit 41. Just let me
5 know when you are ready.

6 Do you know Ms. Ann Tillman?

7 A. Dr. Ann Tillman, yes, I do.

8 Q. Dr. Tillman. She works for Pyxis, correct?

9 A. Yes, she does.

10 Q. Is this the person you supervised in connection with
11 Pyxis' work assisting Willowood in connection with the EPA
12 registration applications?

13 A. It is one of my employees that worked on the azoxystrobin
14 products.

15 Q. Was Ms. Tillman -- or Dr. Tillman, excuse me, the lead
16 Pyxis employee who worked on this matter?

17 A. She was the lead for the technical product. Mr. Mike
18 Kellogg, Michael Kellogg, was the lead for the end-use
19 products.

20 Q. So in terms of the EPA registration for the technical, the
21 active ingredient, Dr. Tillman was the -- at point with
22 Willowood for its application?

23 A. Yes.

24 Q. I think you -- and I may have just -- well, I didn't
25 misspeak, but in terms of Willowood, the actual application for

1 the azoxystrobin technical was not submitted on behalf of
2 Willowood, was it?

3 A. Oh, it was submitted under Greenfield, that's correct.

4 Q. As Greenfield Marketing?

5 A. Yes.

6 Q. An entity in Dubai, is that correct?

7 A. I believe so.

8 Q. Do you know why the testing and formulation in this matter
9 wasn't done in Dubai?

10 A. No.

11 Q. Turning to this Exhibit 41, as it relates to -- this an
12 e-mail string involving work leading up to the application for
13 an EPA registration for azoxy technical, is that right?

14 A. Yes.

15 Q. And do you see, if you go to the earliest e-mail in this
16 string, which is PYX-6401, there is an e-mail from Brian Heinze
17 to Rajesh? Is that correct?

18 A. Yes.

19 Q. And do you see -- the e-mail starts off with the statement
20 from Mr. Heinze: There is one step in the manufacturing
21 process for azoxystrobin that our patent attorney is concerned
22 about being in violation of existing patents. Do you see that?

23 A. Yes.

24 Q. And if you go two e-mails up -- first of all, that first
25 e-mail is dated May 23rd, 2013, is that right?

1 A. Yes.

2 Q. Do you know when Pyxis submitted the application to the
3 EPA on behalf of Greenfield's marketing for azoxy technical?

4 A. I don't recall.

5 Q. If you go two e-mails up, do you see that there's another
6 e-mail on Friday, the following day, from Brian Heinze in which
7 there is a CC showing Ann Tillman being involved or being
8 copied on the e-mail? Is that right?

9 A. Yes.

10 Q. And do you also see that Vijay Mundhra is copied on that
11 e-mail?

12 A. Yes.

13 Q. Do you know who Mr. Mundhra is?

14 A. I don't -- yes, I do.

15 Q. Who is Mr. Mundhra?

16 A. He is an employee of Willowood, I think. I don't remember
17 his title.

18 Q. All right. Do you see SSJ also listed?

19 A. Yes.

20 Q. SSJ is person who you said submitted some deposition
21 testimony that led to a petition to correct or some sort of
22 filing with the EPA to correct portions of or make changes to,
23 let me say, the Willowood azoxy technical registration?

24 A. No. SSJ did a site visit. It was Mr. Wu's deposition.

25 Q. Do you know SSJ?

1 A. I have e-mailed with him over a number of years, but I had
2 not met him until today.

3 Q. You did meet him today?

4 A. Just in the witness room, yes.

5 Q. So in connection with this, Dr. Tillman is being copied on
6 correspondence that relates to concerns in this case as it
7 relates to patent rights, is that right?

8 A. Yes.

9 Q. And do you see that there are questions being asked or
10 comments from Willowood's patent lawyer about the manufacturing
11 process and whether certain changes can be made in the process
12 that would circumvent the process patented by Syngenta? Do you
13 see that?

14 A. Yes.

15 Q. And do you see the response to that e-mail immediately
16 above it from Willowood?

17 A. Yes.

18 Q. And in that response, Rajesh says: Hi, Brian. It seems
19 like all of the manufacturers in China for this product are
20 using the same process and steps for etherification,
21 condensation. These steps -- these step has to be used in a
22 sequence and is very difficult to avoid. Do you see that?

23 A. Yes.

24 Q. Ms. Tillman's reported on this or is copied on this
25 e-mail, is that right?

1 A. She is copied on this, yes.

2 Q. And it continues and says: That's the reason that the MNC
3 patented this step. Do you see that?

4 A. I do.

5 Q. And then at the end it says: SSJ is in touch with the
6 factory guys to find some way out of this, but it seems very
7 difficult to avoid this step. Is that correct?

8 A. That's what the e-mail says, yes.

9 Q. So Pyxis knew all of this information before it submitted
10 the application to the US EPA to register azoxy technical here
11 in the United States, is that right?

12 A. As I said earlier, I don't remember the date when we
13 actually submitted.

14 Q. Well, I'll represent to you that it was July 31st, 2013, a
15 month and a half after this e-mail exchange, but we'll look at
16 some other documents, but assume that for purposes of this
17 question.

18 A. Okay.

19 Q. At the time that Pyxis submitted to the US EPA an
20 application on behalf of Greenfield's marketing, it was aware
21 that there were issues with regard to a patent owned by
22 Syngenta, correct?

23 A. Yes.

24 THE COURT: Okay. It's after 4:00, so I think maybe
25 we need to stop there, even though you are kind of in the

1 middle of the exhibit.

2 All right. Ladies and gentlemen, I'm going to excuse
3 you for the day and for the weekend. I think we're making
4 pretty good progress, but just in view of the uncertainty over
5 the weather, I would like to start on Monday at 9:15 if that
6 was -- anybody have any trouble with that? No. Okay. Let's
7 start Monday morning then and at 9:15.

8 Over the weekend, do not have any contact with any of
9 these folks, lawyers, parties or witnesses. Don't talk about
10 the case among yourselves or with anyone else. So, you know,
11 you'll be home a little longer over the weekend. Don't answer
12 any questions from any family members or neighbors. Don't post
13 or tweet about it. Don't conduct any independent
14 investigation. Don't look anything up on the Internet. Don't
15 read or listen to any news records. Don't talk to your buddy
16 who has a garden about any of these products. You know, just
17 don't do any of that because, as I told you at the beginning of
18 case, it's not fair for you to base your verdict on something
19 that someone tells you outside the courtroom and these folks
20 don't have a chance to question that or draw your attention to,
21 perhaps, some inadequacies or inaccuracies in it. Keep an open
22 mind. I encourage you to just put the case out of your mind
23 over the weekend and enjoy the weather before things get rainy
24 again next week.

25 Leave your notes in your chair. I'll see you Monday

1 morning at 9:15.

2 (The jury was excused at 4:05 p.m.)

3 THE COURT: The witness can step down.

4 (The witness left the stand.)

5 THE COURT: So what can we productively do? Do you
6 all want to put off any arguments on the motions until the
7 close of all the evidence? Plaintiffs indicated they are going
8 to file something. What about the Defendants?

9 MR. TILLER: Whatever Your Honor wants to do.

10 THE COURT: You know, certainly without hearing from
11 anybody, my tentative inclination is to just let everything go
12 to the jury since, you know, the evidence that's come in is
13 pretty consistent with summary judgment, but I'm certainly glad
14 to hear from anybody at any point, that that seems like it
15 would be a good idea so long as the jury is not waiting.
16 Otherwise, I think I'll just put it off to the close of all the
17 evidence.

18 MR. LEVINE: I'll make one suggestion and if you
19 don't want to do it, that's fine. As I said, we're going to be
20 filing something later today that really just lays it out.
21 It's not all that long. Perhaps if we came in at 8:45 on
22 Monday and if you had any questions, you know, we could do
23 whatever argument you wanted then; but I think when you read
24 it, it will be fairly clear and straightforward and give us an
25 opportunity to address it before we start up again.

1 THE COURT: So is that okay?

2 MR. TILLER: I can tell you that we will not be
3 filing anything. We can handle it orally.

4 THE COURT: All right. Well, we can do that. I'm
5 agreeable.

6 After this witness is finished, you anticipate who
7 being your next witnesses?

8 MR. TILLER: Shen Shaojun, otherwise known as SSJ;
9 Andy King. We will be playing a video deposition of Mr. Wu and
10 then likely our two experts.

11 THE COURT: Dr. Lipton and --

12 MR. TILLER: Dr. Lipton and Mr. Jarosz.

13 THE COURT: Okay. So -- all right. We ought to be
14 able to finish that up on Tuesday sometime.

15 MR. TILLER: That's the goal, depending on the
16 weather.

17 THE COURT: Yeah, depending on the weather. It is
18 looking like at the moment it is going west, but who knows.
19 I'm sure we'll get some rain or I'm not the -- it looks like
20 we'll get some rain.

21 All right. I would like to just have a very brief
22 conversation with the four of you all on each side, up to three
23 or four or fewer, about the verdict sheet, just an informal
24 conversation, preliminary, so -- to facilitate my work on the
25 jury instructions over the weekend. If you all can join me in

1 chambers in a few minute.

2 Is there anything else you want to do on the record
3 before we adjourn for the weekend?

4 MR. COUGHLIN: Your Honor, just for clarification,
5 since we're in the middle of testimony, I assume, even though
6 she's not a party to this case, there won't be any
7 consultation.

8 THE COURT: I assume not.

9 MR. TILLER: We are well aware of our ethical
10 obligation.

11 THE COURT: Yes. All right. Well, we will then come
12 back at 8:45 on Monday morning for a brief time of argument on
13 motions and then we'll start with the witness at 9:15.

14 All right. We'll be in recess until Monday morning
15 at 8:45.

16 (Proceedings concluded at 4:09 p.m.)

17

18

19

20

21

22

23

24

25